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c.v

Bill 73
Personal Property Security Act-1985

AUG 2 8 1986
EDMONTON

COMMENTARIES

Alberta
ATTORNEY GENERAL

86-05851/

BILL 73

1985

PERSONAL PROPERTY SECURITY ACT

(Assented to , 1985)

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GENERAL COMMENT:

I. BACKGROUND

1. Bill 73 in the Canadian Context

Bill 73, Personal Property Securtiy Act, can be viewed as another step in the process of fundamental change in Canadian personal property security law which began in Ontario eighteen years ago. To date, Personal Property Security Acts have been enacted in four jurisdictions: Ontario (1967, not fully implemented until 1976); Manitoba (1977); Saskatchewan (1980) and Yukon Territory (1980). In 1982 the Canadian Bar Association and the Uniform Law Conference of Canada jointly adopted the Uniform Personal Property Security Act. Over the last few years, several law reform agencies in Canada have recommended the enactment of legislation similar to Bill 73. In addition, Bill 98, The Personal Property Security Act, was introduced into the Legislature in November 1980 for purposes of discussion.

While Bill 73 draws much of its inspiration from the Uniform Act and Personal Property Security Acts of other Canadian jurisdictions, it is not simply a copy of earlier legislation. The pattern of development of Canadian personal property security law since enactment of the Ontario Personal Property Security Act in 1967 has been characterized by a process of innovation and improvement. It has generally been recognized that experimentation and refinement is a necessary feature of fundamental change in such a complex area of law. The Committee on a Model Uniform Personal Property Security Act established by the Canadian Bar Association to prepare a model for uniform legislation in this area published a draft Act in 1969 which was substantially revised and published as the Uniform Personal Property Security Act in 1982. In the same year, the Uniform Law Conference of Canada withdrew its 1971 Uniform Personal Property Security Act which was based on the 1967 Ontario Act and joined with the Canadian Bar Association in sponsoring the Uniform Personal Property Security Act, 1982. In June of 1985, a committee appointed by the Ontario Ministry of Consumer and Commercial Relations released a report recommending the repeal of the 1967 Ontario Personal Property Security Act and the enactment of a new act in its place. The dynamic nature of developments in Canadian personal property security law is reflected in Bill 73. The Bill embodies refinements based on extensive experience with personal property security legislation in other jurisdictions.

Apart from these refinements, there are features of Bill 73 which are unique. These features accommodate aspects of legal and commercial practices peculiar to this province which have served Albertans well and which, therefore, should be retained. An important example is to be found in Part 5 of the Bill which incorporates by reference those features of the Seizures Act under which seizures of collateral are carried out by a sheriff. See section 59(2).

It should not be assumed, however, that Bill 73 places little importance on interprovincial harmonization of personal property security law. Close attention was paid to the Uniform Personal Property Security Act and the Saskatchewan Personal Property Security Act when drafting the Bill and many of its provisions have direct parallels in these Acts.

2. The Influence of Article 9 of the Uniform Commercial Code

The primary source of many of the concepts and structural features of Canadian personal property security legislation is Article 9 of the American Uniform Commercial Code. This Article is part of the code of commercial law prepared under the sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Law. Article 9, which deals with personal property security transactions, has been adopted by all states of the United States with the exception of Louisiana.

The appeal of Article 9 of the Uniform Commercial Code to Canadian law reformers was that it provided a structure for the creation of a system of personal property security law which, unlike prior law, is unified, conceptually simple and functionally efficient. It offered a method through

which legislators could respond to the need for a system of modern personal property security law which accommodates contemporary secured financing practices.

The use of Article 9 in the Uniform Commercial Code as a model for Canadian personal property security legislation brings some incidental benefits. It makes available to Canadian courts a wealth of jurisprudence generated in American state and Federal courts. Further, it results in a significant degree of international harmonization of personal property security law which facilitates trans-border trade between Canada and the United States.

Canadian law reformers, however, were not content to simply copy Article 9 of the Uniform Commercial Code. It was viewed as a source of basic concepts and structures which could be expanded and refined in the Canadian context. Further, it was recognized that in some situations commercial practices and public policies of Canadian jurisdictions require approaches different from those contained in Article 9.

While there are many differences between Article 9 of the Uniform Commercial Code and Bill 73, perhaps the most important differences will be apparent in the registry systems contemplated by the two pieces of legislation. Article 9 was designed to function in the context of a manual registry. Most states of the United States retain county or regional registries for security interests. Bill 73 contemplates a central, computerized registry system similar in many respects to systems currently in use in Ontario, Manitoba and Saskatchewan and in some respects, the one currently in operation under the Chattel Security Registries Act, S.A. 1983, c-7.1.

II. BASIC CHARACTERISTICS OF BILL 73, PERSONAL PROPERTY SECURITY ACT

1. Structural Integration

Existing Alberta personal property security law has no unified structural basis. Aspects of it are found in six Acts dealing primarily with personal property security transactions as well as many others dealing incidentally with them. Notwithstanding the plethora of legislation in this area, the great bulk of applicable law is still to be found in the rules of common law and equity.

Bill 73 represents a rejection of the traditional approach to this area of the law. While it does not encompass every aspect of Alberta personal property security law, it is designed to integrate into one statute all of the essential features of personal property security transactions falling within the jurisdiction of the Alberta Legislature. Consequently, it preempts most of the existing common law and equitable rules along with the Assignment of Book Debts Act, Bills of Sale Act, Chattel Security Registries Act, Conditional Sales Act and those aspects of the Business Corporations Act relating to corporation securities. See sections 79 and 100 of Bill 73. Because of the new concepts and terminology embodied in the Bill, a number of Acts which deal peripherally with personal property security transactions will be affected. See section 87 of the Bill.

The Bill provides for a system under which the basic attributes of all personal property security transactions governed by provincial law are regulated under a single statute. Accordingly, it deals with contract formalities, the creation of security interests, the methods of perfection of security interests, priorities among secured creditors, and priorities between secured creditors and other claimants such as unsecured creditors, the trustee in bankruptcy, buyers and lessees of collateral. It also deals with enforcement of security interests and conflict of laws issues.

2. Conceptual Unity

Perhaps the most revolutionary feature of the system embodied in Bill 73 is the use of a single generic conceptual basis for all security agreements.

Under existing Alberta personal property security law, very different rules apply depending upon the a priori characterization of transactions. For example, the statutory and common law

applicable to conditional sales contracts is very different from that applicable to chattel mortgages, even though functionally, these two devices are often used to accomplish the same result. Accidents of legal history have resulted in important differences in the conceptual basis of security devices. Some, such as floating charges and assignment of accounts (debts), are creatures of the courts of equity and are governed primarily by the rules of equity. Chattel mortgages are recognized in both law and equity and, consequently, are regulated by the rules of both systems. Conditional sales contracts are governed primarily by the law of sales modified by legislation which recognizes the security aspects of these transactions. Legal mortgages and conditional sales contracts involve the acquisition or retention of a legal title by the secured creditor while the transfer of various forms of equitable title is the central feature of equitable security agreements such as floating charges, equitable mortgages and assignments of accounts. Pledges involve the transfer of a special property interest, but not legal or equitable title.

The differences in origin and conceptual basis of the security devices currently in use in Alberta have not only resulted in a great deal of complexity in the law, but, in addition, have made it impossible for Alberta personal property security law to develop in a consistent, rational way.

Bill 73 embodies an approach to personal property security law under which the form and historic origins of security devices are of no importance. The system is built around a single concept common to all security agreements: the security interest. See section 1(1)(v) of the Bill which states in part:

> (v) "security interest" means an interest in goods, documents of title, securities, chattel paper, instruments, money or intangibles that secures payment or performance of an obligation ....

Section 3(a) declares that the Act applies to:

> every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing, a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust indenture, trust receipt or assignment ...

It is not a sine qua non of the existence of a security interest that any specific form of words be used or that the debtor transfer any title, legal or equitable, to the secured party. What is necessary is that the parties manifest in an agreement an intention on the part of one party to give to another party an interest in personal property in order to secure payment or performance of an obligation. The security agreement may be in the form of a conditional sales contract, a chattel mortgage, or a floating charge; however, its form has no significance except to the extent that it indicates a relationship which under the Act is governed by some special rule. For example, if a security agreement is in the form of a conditional sales contract, no special significance is attached to the fact that the agreement provides for the retention of a legal title by the seller. However, what may be significant is that a conditional sales contract falls in the category of security agreements which give rise to purchase money security interests and, as such, its use invokes special priority rules applicable to this type of security interest.

The rejection of form and labels in favour of a substance test based on a single generic concept permits rationalization of personal property security law. Characterization of a transaction as a security agreement governed by the Act or some other type of agreement outside its scope involves nothing more than a determination as to what is the substance of the agreement. If, in substance, the agreement involves the securing of an obligation through an interest in personal property, it is governed by the Act. For example, it is now well established in most American jurisdictions that a transaction which the parties call a "lease" and which contains no provision for transfer of legal title in the "leased property" to the "lessee" may still be characterized as a security agreement if the essential purpose of the transaction is to finance the purchase of the "leased property".

While all agreements, whatever their form, which provide for a security interest are governed by a single system, this does not mean that they are all subject to the same rules. The system

recognizes functional differences between security agreements and prescribes rules which result in differential treatment. For example, security agreements providing for purchase money security interests are given, for public policy and commercial reasons, a special priority status if certain conditions are met. Further, special rules are provided to reflect established commercial practices involving certain types of collateral such as accounts, chattel paper, negotiable documents of title and negotiable instruments.

3. Flexibility and Accommodation to Modern Business Transactions

One of the factors which ensured widespread acceptance of Article 9 of the American Uniform Commercial Code was that it introduced the concept of a "floating lien" or "continuous general lien". Prior to the introduction of Article 9, personal property security laws of most American states had failed to develop flexible legal devices for use in secured financing of inventory. American courts resisted the growth of anything equivalent to the English floating charge or the equitable mortgage on future property. Article 9 remedied these deficiencies. Since all Canadian common law jurisdictions, including Alberta, were beneficiaries of the English common law, the rigidity which characterized the common law of the United States has been much less apparent in Canada. Floating charges are widely used in situations where a flexible, broadly based financing device is required. Further, the efficacy of equitable mortgages on after-acquired property was early recognized in Canada and bills of sale legislation was amended to permit their use.

While Alberta personal property security law has been more accommodating than pre-Article 9 American law to the needs of the business community with respect to secured inventory financing, it is not free from difficulties. A great deal of uncertainty remains concerning the conceptual basis of the floating charge. This uncertainty arises frequently in the context of priority disputes involving subsequent or prior floating charges, subsequent legal mortgages and claims arising under judgment enforcement proceedings such as garnishment and execution. Further, as a practical matter, floating charges can be given only by corporate debtors.

The law pertaining to specific equitable mortgages on after-acquired property could have provided a useful structure for inventory financing if chattel mortgage registry legislation had been more accommodating. The current Alberta Bills of Sale Act requires in section 4 that a mortgage contain a sufficient and full description of the chattels comprised in it so that the chattels may be readily and easily known and distinguished. Because of the nature of inventory collateral it is often difficult to meet the description requirements of the legislation. A more fundamental deficiency in existing Alberta chattel mortgage law, and one which cannot be eliminated by minor legislative change, is the lack of any reliable and efficient method through which an inventory financer can acquire a security interest in proceeds of the sale of the inventory of his debtor.

The attraction of the system embodied in Article 9 of the Uniform Commercial Code and reflected in Bill 73 is that it adopts many of the best features of Anglo-Canadian equitable mortgage law and avoids most of its difficulties. The system prescribed by Bill 73, like that of Personal Property Security Acts of other Canadian jurisdictions, permits the parties to a security agreement a large measure of freedom to tailor their agreement to fit their particular circumstances. See section 8. The agreement may provide for a security interest in some or all existing and after-acquired property of the debtors. See section 12. Security interests in after-acquired property do not have the subordinate status given to equitable mortgage interests under existing Alberta law. Bill 73 draws no distinction between legal and equitable interests.

One of the most innovative features of modern personal property security legislation is the acceptance of the concept of a security interest in proceeds of original collateral. An inventory financer is given the right to have the security interest in his original collateral automatically carried over into proceeds, whatever their form, resulting from the disposition of the original collateral by the debtor. See section 1(p).

An important aspect of many modern business financing transactions is provision for a line of credit. The debtor is given periodic advances by the lender as they are needed. Under existing

law, the priority position of such a lender can be placed in doubt when a second lender acquires a security interest in the collateral securing the line of credit, or where the collateral is seized under judgment enforcement proceedings. Priority rules of Bill 73 remove any doubt in situations of this kind. See sections 13, 33(3) and 33(4).

Current Alberta law dealing with the assignment of secured instalment contracts (chattel paper)is conceptually unsuited to this important type of consumer and business financing. The primary deficiency in the present law is that it does not recognize chattel paper as a form of collateral itself, but rather treats it as having two separate components: a debt, the assignment of which is governed by the law of choses in action, and an interest in goods governed by chattel property law. This bifurcation is a source of major difficulties where priority issues are involved. Bill 73 recognizes chattel paper as a single type of collateral and provides a special set of priority rules for transactions involving chattel paper, designed to reflect established practices in this area of financing. See sections 1(c), 27 and 29.

4. Priority Rules

As noted above, current Alberta personal property security law is embodied primarily in the rules of law and equity and in statutory provisions. Consequently, it lacks coherence, particularly as it deals with priority issues. Some types of security interests involve legal title; others involve equitable interests only. Frequently, the nature of the interests acquired by the secured party has a very important effect on his priority status. Superimposed on the relevant common law or equitable priority rules is a second level of priority considerations associated with the registry statutes. The result, in total, is a very complex set of priority rules which make risk assessment very difficult and which do not always produce commercially reasonable results, when applied.

Bill 73 sets out an extensive, integrated set of priority rules which are designed to add certainty to the law and to reflect the reasonable expectations of credit grantors and other persons who deal with debtors. Inter alia, these rules provide solutions to priority disputes involving competing interests of secured parties, unsecured creditors, and buyers.

Important aspects of the priority system of the Bill are closely integrated with the registry system prescribed by the Bill for perfection of security interests. As a practical matter, most contemporary security agreements provide for non-possessory security interests perfected through registration in a central registry. Reform of personal property security law along the line set out in Bill 73 will involve the further development of the existing computerized central registry to one which employs a notice registration system. Under this type of system, only a single notice or financing statement containing basic information is registered; security agreements are not. Where inventory is involved the collateral description required on the financing statement need not be specific but can be generic. Consequently, the registration can relate to a single security agreement covering a wide range of personal and after-acquired property. Further, a single registration can perfect security interest arising under a series of security agreements between the same secured party and debtor.

5. Rights and Obligations After Default

Proceeding from the premise that all security agreements are designed to accomplish the same end, the system prescribed in Bill 73 for the regulation of default rights and remedies contains a set of rules, applicable for the most part to all security agreements and designed to recognize the interests of creditors and debtors. See sections 56-67. Most of these rules cannot be changed by agreements. However, part of the wide supervisory jurisdiction given to the courts by the Bill includes the power to relieve from strict compliance where the interests of justice dictate the necessity to do so. See section 67.

Part 5 provides for the retention of those features of the Seizures Act which require the involvement of the sheriff in most seizures of collateral. See section 59(2). However, it has not incorporated provisions of the Act under which a defaulting debtor can force a post-seizure court

hearing merely by returning the statutory notice to the sheriff. Instead, there are specific provisions in Part 5, along with provisions giving broad powers to the courts to supervise the exercise of secured creditors' rights, which are designed to accord protection to debtors against illegal acts or abuse of realization rights.

6. Conflict of Laws

All modern personal property security regimes include rules which deal with the difficult choice of law questions which frequently arise in the context of secured transactions. Bill 73 is no exception. While some current Alberta registry statutes provide for the registration of out of province security interests on goods brought into Alberta, none of them provides a general set of choice of law rules for all types of collateral. Bill 73 contains a comprehensive set of conflict of laws rules which remove much of the uncertainty and confusion prevalent in this aspect of existing personal property security law. See sections 5-7. Similar provisions are found in the Personal Property Security Acts of other Canadian provinces.

7. Consumer Protection

While Bill 73 contains a number of provisions designed to compensate for the weaker position usually occupied by debtors, it was not designed for consumer protection nor would its enactment displaced credit consumer protection measures contained in other Alberta legislation such as Part 6 of the Law of Property Act. The Bill is drafted so as to give supremacy to consumer protection legislation which contains measures coming into conflict with its provisions. See section 73(1).

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1(1) In this Act,

(a) "accessions" means goods that are installed in or affixed to other goods;

COMMENT:

This definition relates primarily to section 35 which permits the taking and retention of a security interest in goods which are attached to other goods. It is to be noted that the test prescribed in the definition as to what is an accession is much broader than any of the common law tests of accession.

(a.1) "account" means a monetary obligation not evidenced by chattel paper, an instrument or securities, whether or not it has been earned by performance;

COMMENT:

An account is a specie of the genus "intangible" defined in section 1(k). The more traditional term "book debt" has been displaced by "account" since in many cases debts are no longer recorded in the books but rather on computer tapes or discs and since business people now use the term "accounts receivable" when referring to monetary obligations arising out of sale of goods or services. In order to fall within the definition, a right need not be a current debt; and in order to be assigned an account need not be earned.

(b) "building" includes a structure, erection, mine or work built, erected, constructed or opened on or in land;

(b.1) "building materials" includes goods that are or will become incorporated or built into a building so that their removal would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building, apart from the value of the goods removed, but does not include

(i) goods that are severable from the building or land merely by unscrewing, unbolting, unclamping or uncoupling, or by some other method of disconnection, or

(ii) machinery installed in a building for use in the carrying on of an activity where the only substantial damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery from the building is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;

COMMENT:

This definition and the definition of "building" relate exclusively to section 34 which permits the taking and retention of security interests in goods which become affixed to land. The definitions provide some guidance on the difficult question as to the scope of the term "fixture" as it appears in section 34. However, it does not purport to be a definition of the term "fixture". The purpose of the definition is to make it clear that a security interest in building materials as personal property cannot be protected under the system prescribed in section 34 once those building materials become integrated into real property.

(c) "chattel paper" means 1 or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or a security interest in specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions;

COMMENT:

This clause defines a type of collateral not recognized under existing Alberta law. Special rules dealing with transfers of interests in chattel paper are set out elsewhere in the Bill. See section 29(5). While the most common form of chattel paper currently in use in Alberta is the conditional sales contract, the definition encompasses as well mortgages on or leases of specific goods. However, a mortgage on specific and after-acquired property would fall outside the definition and the rules applicable exclusively to chattel paper transactions would not apply to the transfer of an interest in such a mortgage.

(c.1) "collateral" means personal property that is subject to a security interest;

COMMENT:

Categories of collateral identified in the Bill are goods, documents of title, securities, chattel paper, instruments, money and intangibles.

(d) "consignment" means a transaction under which goods are delivered for sale, resale or lease to a person who in the ordinary course of his business deals in goods of that description for sale, resale or lease by a person who

(i) in the ordinary course of his business deals in goods of that description, and

(ii) reserves a proprietary interest in the goods after they have been delivered,

but does not include a transaction under which goods are delivered to a person for sale, resale or lease if the person is generally known in the area in which he carries on business to be selling or leasing goods on behalf of others;

COMMENT:

1. The purpose of this definition is to identify a type of non-security transaction which falls within the conflicts, perfection and priority provisions of the Act. See sections 1(1)(v) and 3(b).

2. The definition does not encompass consignments where either the consignor or the consignee is not in the business of dealing with the goods consigned and consignments where the consignee is generally known to be acting in such capacity and is therefore not in the position to deceive any third party as to the ownership for the goods consigned to him. Of course, if the consignment is in substance a security agreement, the exclusions are inapplicable and it is treated like all other security agreements.

(d.1) "consumer goods" means goods that are used or acquired for use by the debtor primarily for personal, family or household purposes;

COMMENT:

Under the scheme of the Bill, all goods must fall within one of three categories: consumer goods, inventory or equipment. The category, equipment, is residual.

2. It should be noted that the three categories of goods do not describe types of goods, for example, automobiles, horses, trucks, etc., but rather the use being made of the goods by the debtor in possession. This being the case, the same goods may at one time be inventory but later be consumer goods or equipment if the use to which they are being put by the debtor is changed.

3. This definition relates primarily to sections 5(2), 28(2) and 66(1)(b).

4. The regulations prescribing requirements for the registration of security interests in goods will include special provisions dealing with the perfection of security interests in certain types of consumer goods.

(e) "Court" means the Court of Queen's Bench;

(e.1) "creditor" includes an assignee for the benefit of creditors, an executor, an administrator or a committee;

(f) "debtor" means a person who owes payment or other performance of the obligation secured, whether or not that person owns or has rights in the collateral, and includes any one or more of the following:

(i) a person who receives goods from another person under a consignment;

(ii) a lessee under a lease for a term of more than 1 year;

(iii) an assignor of an account or chattel paper;

(iv) except in sections 1(q), 9, 20, 26, 32, 34(4), 35(4), 38, 60(4), (5), (6) and (9), 61 and 62, a transferee of or a successor to another debtor's interest in collateral;

COMMENT:

1. This definition gives a much broader scope to the term "debtor" than it has in common English usage. In the context of secured debt, a debtor is usually someone who has incurred an obligation and who has given a security interest in his personal property to secure the obligation. However, the definition extends the scope of the term well beyond this type of debtor.

2. The definition makes it clear that a person may be a debtor even though he has not directly received the benefit of the security agreement. When one person has incurred the primary obligation and a second person has provided collateral to secure that obligation, the second person is also a debtor since he "owes payment or other performance of the obligations secured" to the extent that his property can be used as a source of repayment of the obligation.

3. The definition encompasses a person who has contractually guaranteed the repayment of the obligation but has not given a security interest in his personal property.

4. While the definition includes a primary debtor, a person who has provided collateral to secure the debt and a person who has guaranteed repayment of the obligation, section 1(3) indicates that it is not intended that the use of the word "debtor" in a particular section necessarily refers to all such persons. Each section in which the term appears must be examined carefully to determine from the context of the section what type or types of "debtors" are being referred to.

5. The definition encompasses consignees, lessees and assignors of accounts or chattel paper. This is necessary because the conflicts, perfection and priority sections of the Bill apply to consignments, leases and sales of accounts or chattel paper.

6. It is important that the definition includes persons who succeed to the interest of a debtor. However, it is not necessary or desirable to apply all sections using the word "debtor" to such persons. Accordingly, the definition identifies those sections in which the word "debtor" does not include a transferee or successor to another debtor's interest.

(f.1) "default" means the failure to pay or otherwise perform under the secured obligation when due, or the occurrence of any event or set of circumstances on which under the terms of the security agreement the security interest becomes enforceable;

(g) "document of title" means a writing

(i) that purports to be issued by or addressed to a bailee,

(ii) that purports to cover goods in the bailee's possession that are identified or are fungible portions of an identified mass, and

(iii) that in the ordinary course of business is treated as establishing that the person in possession of the writing is entitled to receive, hold and dispose of the writing and the goods it covers;

COMMENT:

1. This definition provides a description in generic terms of the types of instruments generally recognized in Alberta as documents of title, the most common of which are bills of lading and warehouse receipts.

2. The Act draws important distinctions between negotiable and non-negotiable documents of title. See sections 22(e), 24, 25 and 29(4). The definition should be viewed as encompassing both types of documents. Since the Bill does not contain a definition of negotiable document of title, resort to the common law (see section 65(5)) and to legislation such as the Warehouse Receipts Act is required.

(g.1) "equipment" means goods that are held by a debtor other than as inventory or consumer goods;

COMMENT:

1. See commentary to section 1(1)(d.1) "consumer goods". See also section 1(1)(j).

2. The definition relates primarily to sections 7(2)(a) and 28(4). However, in addition, the regulations prescribing requirements for the registration of security interests will include special provisions dealing with the perfection of security interests in certain types of equipment.

(h) "financing statement" means a writing required or permitted to be registered pursuant to this Act and includes a financing change statement, where the context requires;

(h.1) "Fund" means the Personal Property Security Assurance Fund continued under section 45;

(i) "fungibles" means, with respect to goods or securities, goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement;

(i.1) "future advance" includes the payment of money, the provision of credit or the giving of other value by a secured party secured by the terms of a security agreement whether or not the secured party is obligated to pay the money, provide the credit or give the value;

(j) "goods" means tangible personal property other than chattel paper, documents of title, instruments, securities and money, and includes fixtures, growing crops and the unborn young of animals, but does not include timber until it is cut or minerals until they are extracted;

COMMENT:

See commentary to section 1(1)(d.1) "consumer goods", section 1(1)(g.1) "equipment" and section 1(1)(k.1) "inventory".

(j.1) "instrument" means a bill, note or cheque within the meaning of the *Bills of Exchange Act* (Canada) or any other writing that evidences a right to the payment of money and is of a type or kind that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, but does not include

(i) chattel paper,

(ii) a document of title, or

(iii) securities;

COMMENT:

This definition relates primarily to sections 22(1), 24, 29(2) and 29(3). Chattel paper, which is given a quasi-negotiable status under the Bill, and securities which may be in the form of negotiable debt obligations are treated separately from instruments and are therefore excluded from the definition.

(k) "intangible" means personal property other than goods, chattel paper, documents of title, instruments and securities;

COMMENT:

This definition identifies intangibles only by elimination. However, it is clear what are included in this category are choses in action, including accounts and other contract rights, as well as other types of intangible property rights such as good will, copyright, trade mark rights and patent rights.

(k.1) "inventory" means goods

(i) that are held by a person for sale or lease, or that have been leased,

(ii) that are to be furnished or have been furnished under a contract of service,

(iii) that are raw materials or work in progress, or

(iv) that are materials used or consumed in a business;

COMMENT:

1. See commentary to section 1(1)(d.1) "consumer goods" and section 1(1)(g.1) "equipment". See also section 1(1)(j) "goods".

2. This definition relates primarily to sections 7(2), 29(5)(b) and 32.

3. This definition expands the ordinary meaning of the word "inventory" to include leased goods, goods furnished under a service contract, raw materials and materials used or consumed in a business.

(l) "judge" means a judge of the Court;

(l.1) "lease for a term of more than 1 year" includes

(i) a lease for an indefinite term even though the lease is determinable by 1 or both parties not later than 1 year of its execution,

(ii) subject to subsection (2), a lease initially for 1 year or less than 1 year, if the lessee, with the consent of the lessor, retains uninterrupted, or substantially uninterrupted, possession of the leased goods for a period in excess of 1 year after the date the lessee first acquired possession of the goods, or

(iii) a lease for a term of 1 year or less that is automatically renewable or that is renewable at the option of one of the parties, or by agreement, for 1 or more terms, the total of which terms may exceed 1 year,

but does not include

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods, or

(v) a lease of any prescribed goods, regardless of the length of the term of the lease;

COMMENT:

1. This definition identifies one of the non-security transactions which fall within the scope of the perfection and priority sections of the Bill. See sections 1(1)(v) and 3(b).

2. The essential objective of the definition is to encompass leases which have a term of more than one year or which in all likelihood will extend beyond the term of one year. See commentary to section 3(b).

3. Subclause (ii) operates very differently from subclauses (i) and (iii). Subclauses (i) and (iii) involve assessment of the agreed or potential term of a lease at the date of its execution. Subclause (ii) deals with the situation in which a lease was initially intended to have a term of one year or less but in fact turns out to be a lease for more than one year as a result of overholding by the lessee or some other arrangement under which the lessee remains in possession for a period in excess of one year. In such a case, the lease becomes one which falls within the scope of the Bill only after the lessee's possession extends beyond one year. The definition does not contemplate retroactive application.

4. Non-commercial leases are excluded from the scope of the definition. Further, the Lieutenant Governor in Council has the power to exclude leases involving specified types of goods. This power could be exercises so as to exclude from the operation of the system leases of items of small value such as telephone receivers or items of large value which are known by most people to be held under lease arrangements.

5. A transaction which is in substance a security agreement although labelled a lease is not within the scope of this definition. It would be treated like any other security agreements. See section 3(a).

(m) "minerals" means minerals as defined in the *Mines and Minerals Act;*

(m.1) "Minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Act;

(n) "money" means a medium of exchange designated by the Parliament of Canada or designated by a foreign government as part of its currency;

COMMENT:

This definition relates primarily to sections 22(1)(f), 29(1) and 29(2).

(n.1) "obligation secured" means, when determining the amount payable under a lease that secures payment or performance of an obligation,

(i) the amount originally contracted to be paid under the lease,

(ii) any other amounts payable pursuant to the terms of the lease, and

(iii) any other amount required to be paid by the lessee

to obtain full ownership of the collateral;

COMMENT:

This definition relates primarily to sections 34(10), 35(10), 60(1)(b), 60(12), 62(1), 62(3), 62(7) and 63(1)(a). Its purpose is to prescribe the amount which must be paid to obtain ownership of goods under a transaction which is in the form of a lease, but which is in substance an instalment sales contract and therefore a security agreement. For example, the definition prevents the argument that the lessee-buyer need not pay an amount specified in the transaction as a pre-requisite to the exercise of an option to purchase when he seeks to redeem his interest in the leased goods under section 63(1)(a).

(o) "person" means an individual, partnership, association, corporation, trustee, executor, administrator or legal representative;

(o.1) "prescribed" means prescribed by the regulations;

(p) "proceeds" means identifiable or traceable personal property in any form or fixtures derived directly or indirectly from any dealing with collateral or the proceeds of the collateral, and includes

(i) an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds therefrom, or any right to that payment, and

(ii) any payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or securities;

COMMENT:

1. This definition relates primarily to sections 26 and 32.

2. The definition describes a category of collateral on the basis of its origins. Any identifiable or traceable personal property which is a product of any dealings with original collateral or proceeds falls within the scope of the definition. For example, a secured party may have a security interest in a dealer's inventory of automobiles. When the dealer sells his automobiles, personal property in one or more forms may be derived, including money, accounts, chattel paper, instruments or automobiles taken as trades. This property is "proceeds" of the inventory of automobiles which is the original collateral under the security agreement.

3. In order for personal property to be "proceeds" it must be possible to identify it as property derived from a dealing with the original collateral or proceeds or must be property in which the interest in the original collateral can be traced. Since the Act does not provide tracing rules, it is intended that the appropriate tracing rules of equity will be employed.

4. The definition includes personal property derived from any dealing with "proceeds". In other words, the concept of "proceeds" is not limited to personal property derived from dealings with original collateral. See commentary to section 26.

5. Since insurance payments are not derived from a "dealing" with collateral or proceeds, it is necessary to extend the definition to encompass such payments.

(p.1) "purchase" includes taking by sale, lease, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;

COMMENT:

This term has a much broader scope under the Bill than it has in common English usage. "Purchase" is not coterminous with "buy"; it includes acquisition of property under a sales agreement, but it also includes acquisition of any type of interest under a consensual transaction. See for example sections 29(3), 29(5), 34(3) and 35(3). See section 1(1)(q.1) "purchaser".

(q) "purchase money security interest" means

(i) a security interest taken or reserved in collateral to secure payment of all or part of its purchase price,

(ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to collateral, to the extent that the value is applied to acquire those rights,

(iii) the interest of a lessor of goods under a lease for a term of more than 1 year, or

(iv) the interest of a person who delivers goods to another person under a consignment;

COMMENT:

1. This definition relates primarily to sections 20 and 32.

2. Two types of transactions are encompassed in the definition: instalment sales contracts under which the obligation of the buyer is secured in whole or in part by a security interest taken by the seller in the goods involved; and a loan transaction where money is loaned or value is given in order to enable the borrower to acquire rights in or to goods and where the lender is given a security interest in those goods. It is not enough to show that the debtor obtained the loan from a secured party and acquired rights in or to property of the kind described in a security agreement. In order for a security interest to qualify under subclause (ii) the loan must have been made for the purposes of acquiring rights in or to the collateral and must in fact have been used for that purpose. It is necessary to establish the nexus between the purpose and use of the loan on the one hand and the acquisition of the interest in or to the collateral on the other.

3. The interests of lessors under non-security leases and consignors under non-security consignments approximate those sellers under secured instalment sales contracts. Consequently, owners of these interests are treated as having purchase money security interests.

(q.1) "purchaser" means a person who takes by purchase;

COMMENT:

See commentary to section 1(p.1)

(r) "Registrar" means the Registrar of Personal Property designated under section 40;

(r.1) "Registry" means the Personal Property Registry established under Part 4;

(s) "secured party" means

(i) a person who has a security interest, and

(ii) the trustee, if a security agreement is embodied or evidenced by a trust indenture,

and for the purposes of sections 16, 57 to 59, 60 except subsections (4), (11) and (14) and 61 to 63, includes a receiver and a receiver-manager;

COMMENT:

This definition extends the natural meaning of the term "secured party" to include a trustee under a trust indenture who acts on behalf of the debenture holders and to include for specific purposes, a receiver and receiver-manager who is appointed either by the secured party or a court, but who is not the alter ego of the secured party.

(t) "securities" means a security as defined in section 42(2)(m) of the *Business Corporations Act;*

COMMENT:

1. The reference in the definition should be to section 44(2)(n) of the Business Corporations Act.

2. Section 44(2)(n) of the Business Corporations Act provides:

"security" or "security certificate" means an instrument issued by a corporation that is

(i) in bearer, order or registered form,

(ii) of a type commonly dealt with on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt with as a medium for investment,

(iii) one of a class or series or by its terms divisible into a class or series of instruments, and

(iv) evidence of a share, participation or other interest in or obligation of a corporation.

3. The definition relates primarily to sections 22, 24 and 29(3).

(u) "security agreement" means an agreement that creates or provides for a security interest, and, if the context permits, includes a writing that evidences a security agreement;

COMMENT:

The definition encompasses both the legal concept and the writing that evidences its presence in the particular case. A security agreement need not be in any particular form. In fact, it does not even have to be in writing if a pledge is involved or if the parties intend it to be enforcable only inter partes. See section 9(1).

(v) "security interest" means an interest in goods, documents of title, securities, chattel paper, instruments, money or intangibles that secures payment or performance of an obligation and includes

(i) an interest arising from a transfer of an account or transfer of chattel paper,

(ii) the interest of a person who delivers goods to another person under a consignment, and

(iii) the interest of a lessor under a lease for a term of more than 1 year,

notwithstanding that the interests described in subclauses (i) to (iii) may not secure payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading to his own order or to the order of his agent, unless the parties have otherwise evidenced an intention to create or provide for a security interest;

COMMENT:

1. Notwithstanding that the concept of a "security interest" is essential to the entire system embodied in Bill 73, the term is defined in a very general way. Some elucidation of the nature of the interest involved can be obtained from sections 3 and 11. The types of transactions enumerated in section 3 traditionally involve the transfer of some form of proprietary interest by the debtor to the secured party. However, it is incorrect to conclude creation of a security interest necessarily involves the transfer of a legal or equitable title to the secured party. Section 3 makes this clear. However, for a security interest to come into existence or to "attach" a debtor must have "rights in the collateral". See section 11(1)(b). What is clear is that a security interest may be found to exist any time one person, the debtor, agrees that another person, the secured party, is to have an interest in his property so as to provide an alternative source of payment or compensation to the secured party in case an obligation owing by the debtor to the secured party is not discharged. It is not important to identify the nature of the proprietary interest involved since nothing turns on this. What is important is that a proprietary interest is given as a guarantee of discharge of the obligation.

2. The extention of the definition to include interests of lessors under non-security leases, consignors under non-security consignments and interests arising from non-security transfers of accounts or chattel paper complements section 3(b) which brings these transactions within the conflict, perfection and priority provisions of the Bill.

3. The definition makes it clear that when goods are shipped under an order bill of lading the interest of the seller is not to be treated as a security interest unless there is additional indication that the parties intended a more elaborate secured financing relationship. While technically the seller's interest under an order bill of lading is an interest in goods that secures performance of an obligation, there is no good reason to bring this type of arrangement within the scope of the Act unless the parties indicate an intention to do so. For example, in the event of non-payment of the purchase price, the reasonable expectations of the seller are that he can prevent delivery of the goods and dispose of them in the market. However, if the transaction were to be treated as a security agreement he would be required to comply with the elaborate system of Part 5 of the Bill. This would be commercially unrealistic.

(w) "serial numbered goods" means goods of a type prescribed to be serial numbered goods;

COMMENT:

This definition relates primarily to section 28(4). In addition, the regulations which prescribe registration requirements will provide for the registration of security interests in certain types of goods by serial number as well as by debtor name.

(x) "specific goods" means goods identified and agreed on at the time a security agreement in respect of those goods is made;

COMMENT:

This definition relates primarily to section 1(1)(c).

(y) "trust indenture" means any deed, indenture or document, however designated, including any supplement or amendment thereto, by the terms of which a corporation issues or guarantees, or provides for the issue or guarantee of, debt obligations and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for thereunder and secured by a security interest;

COMMENT:

This definition relates primarily to sections 1(1)(s) and 52(6).

(z) "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability.

COMMENT:

Under the definition, value is not equivalent to common law consideration in that it includes an antecedent debt or liability. The term "new value" is used in the Bill to indicate a situation in which an antecedent debt is not sufficent for the particular priority status. See, for example, section 29(5).

(2) A lease referred to in subsection (1)(l.1)(ii) does not become a lease for a term of more than 1 year until the lessee's possession extends for more than 1 year.

(3) If the debtor and the owner of the collateral are not the same persons, the debtor is deemed to be

(a) an owner of the collateral, in a provision of this Act dealing with the collateral, or

(b) an obligor, in a provision of this Act dealing with the obligation,

or both where the context requires.

PART 1
GENERAL

The Crown is bound

2 The Crown is bound by this Act.

COMMENT:

This section is to design to ensure that Crown cannot take the benefits of the system of personal property security law prescribed by the Bill without also complying with its requirements.

Application of Act

3 Subject to sections 4 and 56, this Act applies to

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing, a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust indenture, trust receipt or assignment, and

(b) a transfer of an account or chattel paper, a lease of goods for a term of more than 1 year and a consignment notwithstanding that the transfer, lease or consignment does not secure payment or performance of an obligation.

COMMENT:

1. This section prescribes the scope of the Bill; it is the starting point of any inquiry directed toward determining whether or not a particular transaction falls within the Bill. The section encompasses two types of transactions: generic security agreements and deemed security agreements.

2. Section 3(a) provides some rules to be applied when determining what types of transactions are security agreements governed by the system embodied in Bill 73. The section prescribes a "substance" test; form is not important. For example, a transaction which is labelled a "lease" would be a security agreement if, in substance, it provides for a security interest. If the essential purpose of the transaction is to finance the acquisition of the leased chattels, it is a security agreement, whatever label the parties have used. The essential fact is that the agreement is one under which an interest has been taken to secure payment or performance of an obligation. Nor does it matter that the transaction makes no provision for transfer of legal title to the "lessee". Under section 3, characterization does not depend upon who has title.

3. Section 3(a) makes it clear that a security agreement need not contain any particular form of words or formula in order for a security agreement to come into existence. In particular, it eliminates the need to recite in the agreement that the debtor transfers a title to the secured party or that a seller retains title to the goods being sold to the debtor on a secured credit basis. So long as one person, the debtor, agrees to give a security interest in specific property to another person, a secured party, the basic elements of a valid security agreement exists. However, in some situations there may be good legal reasons for continuing to use the old form of a security agreement or for including in a security agreement a title retention or transfer clause. For example, section 89(1) of the Indian Act R.S.C. 1970, c. I-6 provides that the personal property of an Indian or Band situated on a reserve is not subject to a mortgage in favour of anyone except an Indian. However, section 89(2) provides that a person who sells to an Indian or to a Band a chattel under a title retention agreement may exercise his right of repossession even though the chattel is situated on a reserve.

4. Section 3(a) includes a non-exclusive list of traditional types of security agreements which fall within the scope of the Bill. However, for the purposes of the system prescribed by the Bill, it is not important that a security agreement take the form of any of these types of transactions.

5. Although the transfer or retention of any type of title or property is not involved in the creation of a security interest, it does not follow that the concepts of property and title are irrelevant. In order for a security interest to come into existence, inter alia, the debtor must have rights in the collateral. See section 11(1). To this extent, the principle of nemo dat quod non habet remains important. However, a security agreement need not identify the nature and extent of the debtor's interest nor need it contain any words providing for the transfer of that interest to the secured party.

6. Section 3(b) enumerates the types of non-security transactions which are subject to the conflict of laws, perfection and priority rules of the Bill. Note that these transactions are not ones that "secure payment or performance of an obligation" and are therefore not within the scope of Part 5. See section 56(1).

7. The decision to include certain non-security transactions within the scope of Bill 73 was based on practical commercial considerations. The Uniform Act, the Saskatchewan Personal Property Security Act and the Yukon Personal Property Security Act also apply to these transactions. If the recommendations of the Ontario Minister's Committee on the Personal Property Security Act, 1984, are adopted, the Ontario Personal Property Security Act will be amended so as to parallel Bill 73 in this respect.

8. Section 3(b) extends the Bill to non-security transfers of accounts and chattel paper. Under existing Alberta law, the priority rules applicable in cases of successive assignments of an account are the same whether the assignments involve sales of the account or transfers for security purposes. See Assignment of Book Debts Act R.S.A. 1980, c. A-47, s. 1(c).

It is important to note that the effect of sections 3(a) and 3(b) is to require registration of a much wider range of assignments than is required under current Alberta law. Under the Assignment of Book Debts Act only a general assignment of book debts made by a person engaged in a trade or business needs to be registered. An assignment of book debts due at the date of the assignment from specified debtor and an assignment of book debts becoming due under specified contracts need not be registered. Bill 73 requires the registration of all assignments, specific or general other than those specifically excluded by section 4.

Accordingly, an assignment of a single account due or accruing due under a specified contract is within the scope of the Bill. As to the method prescribed by the Bill to deal with the transition from the existing to the new system see section 76(5).

9. One of the innovative features of Bill 73 is that it recognizes chattel paper as a separate type of collateral. See section 1(1)(c). In addition it prescribes a set of priority rules applicable to transfers of chattel paper. Under these rules chattel paper is treated as quasi-negotiable property. See sections 27 and 29(5). These rules do not distinguish between security and non-security transfers of chattel paper since most of the issues addressed by them arise in the context of both types of transfers.

10. The decision to include consignments and leases for a term of more than one year within the scope of the conflict of laws, perfection and priority provisions of the Bill, does not represent a revolutionary change in the law. The requirement that certain types of true leases of chattels be registered is a feature of current Alberta law. See Conditional Sales Act R.S.A. 1980, c. C-21, s. 2.

11. True consignments and leases have one feature in common with security agreements. They create a potential for deception of innocent third parties who deal with the consignee or lessee in the belief that no one else has an interest in the goods held by the consignee or lessee. The essential purpose of the registry system contemplated by Bill 73 is to protect innocent third parties who might otherwise suffer loss as a result of dealing with the person who has given a security interest in his property. The system which avoids deception in the cases where secured transactions are involved can be employed with equal effectiveness in cases where certain types of non-security transactions create the same type of deception.

It is totally unrealistic to attempt to bring within the scope of the Bill every kind of transaction in which deception results from the separation of interest and the appearance of interest.

However, it is realistic to include certain types of transactions which, because of their commercial importance, are likely to continue to produce disruption if left out. Long term leases and certain types of true consignments fall within this category. Note, however, that the inter partes sections of the Bill (Part 5) do not apply to non-security leases in consignments unless they are in substance security agreements.

12. Not all consignments and chattel leases are subject to the Act. Consignment agreements between private citizens and mercantile agents are excluded. See definition of "consignment" in section 1(1)(d). While there is potential for deception in all leases, it is commercially impractical to require all leases to be registered. The volume of short term leases such as car rentals would be overwhelming, and the cost of registering every such transaction would be prohibitive. Where long term leases are involved, these problems are not of such dimension as to cause concern. Any definition distinguishing long term leases which fall within the Bill from short term leases which do not, to a large extent must be arbitrary. Section 1(1)(l.1) makes the cutoff at one year.

13. Bill 73 provides for the amendment of the Employment Standards Act (section 82), the Factors Act (section 83), the Sale of Goods Act (section 94), the Garagemen's Lien Act (section 84) and the Matrimonial Property Act (section 89) so as to provide interests arising under or recognized by these Acts be registered in the Personal Property Registry. However, unlike section 3(b) of the Bill, the above-noted sections do not subject these transactions to the conflict of laws, perfection or priority rules of the Bill.

Non-application of Act

4 Except as specifically otherwise provided, this Act does not apply to the following:

(a) a lien, charge or other interest given by statute or a lien given by rule of law for the furnishing of goods, services or materials;

(b) an assignment of an interest or claim in or under any contract of annuity or policy of insurance, except insofar as the money payable under a policy of insurance is or would be indemnity or compensation for loss of or damage to collateral, or any right to any such money payable;

(c) an assignment of present or future wages, salary, pay, commission or any other compensation for labour or personal services;

(d) an assignment of a right to payment under a contract to an assignee who is to perform the assignor's obligations under the contract;

(e) the creation or assignment of an interest in or a lien on real property, including a lease;

(f) an assignment of a right to payment or rent that arises in connection with an interest in or lien on real property, other than a right to payment evidenced by securities;

(g) a sale of accounts or chattel paper as part of a sale of the business out of which they arose, unless the vendor remains in apparent control of the business after the sale;

(h) an assignment of accounts made solely to facilitate the collection of accounts for the assignor;

(i) an assignment of a claim for damages or a judgment representing a right to damages;

(j) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency.

COMMENT:

1. This section sets out a list of transactions which are excluded from the scope of the Bill. Most of these transactions are security agreements and, without section 4, would fall within the scope of the Bill. However, for commercial, administrative or public policy reasons they are excluded.

2. From a purely technical point of view, section 4(a) is redundant since the Bill applies only to interests created by agreement and not to liens or charges arising by operation of the law. The subsection has been included ex abundanti cautela.

3. Section 4(b) excludes from the scope of the Bill security assignments of interests in insurance policies except to the extent that the interest involves a right to payment under a policy of insurance providing indemnity or compensation for loss or damage to collateral. This is a standard exclusion found in Article 9 of the Uniform Commercial Code and all other Canadian Personal Property Security Acts. It is based on the assumption that there is no demonstrated need to subject the practice of taking insurance interests as security for debt to a complex regulatory regimes such as that contained in Bill 73. An apparently effective system for regulating priority disputes involving insurance interests is contained in the Insurance Act R.S.A. 1980, c. I-51, ss. 223, 266 and 269.

4. Assignments of wages and other compensation for personal services are void in Alberta if made in favour of commercial lenders. See Wage Assignments Act R.S.A. 1980, c. W-1. Accordingly, such assignments have little or no commercial significance in Alberta and as such need not be regulated under Bill 73. Section 4(c) reflects this conclusion.

5. Section 4(d) excludes from the scope of the Bill an assignment of a right to payment under a contract where the assignee is to perform the assignor's obligations under the contract. The reason for this exclusion is obvious. If the assignee earns the right to payment by his performance, there is little likelihood that the assignor will be in the position to deceive anyone with respect to his right to receive the payment.

6. Section 4(e) deals with the troublesome question as to the extent of overlap between personal property law and real property law. For example, for some purposes a real property mortgage is considered to be personalty; yet, the same type of interest is subject to the Land Titles Act. Commercial certainty requires that the applicable law be identified with clarity. Section 4(e) embodies the conclusion that the Personal Property Security Act is not the best source of statutory regulation for those types of transactions which involve interests in real property.

7. Section 4(f) extends the policy of section 4(e) to payment rights, which are clearly personalty, arising in connection with the lease of or lien on real property. Accordingly, an assignment of lease rental payments or payments due under a real property mortgage are not subject to the Bill. There is an exception to the exclusion. A right to payment which arises in connection with real property which is evidenced by a security is included within the scope of the Bill. A security is defined in section 1(1)(t) by reference to the Business Corporations Act as, inter alia, an instrument issued by a corporation that is evidence of an obligation of a corporation. The obligation represented by the security may be secured by an interest in the right to payment arising in connection with an interest in or lien on real property. Under section 4(f) the agreement providing for the security interest is not within the scope of the Bill. However, a security interest in the security itself is. The fact that the obligation represented by the security is secured by the right to payment arising in connection with real property does not disqualify the security itself as a type of collateral, a security interest in which is within the regulatory scheme prescribed by the Bill.

8. When the sale of a business includes accounts or chattel paper associated with the business there is little likelihood that third parties will be deceived into thinking that the vendor remains owner of the accounts or chattel paper unless he continues in control of the business after the sale. Accordingly, an assignment of these accounts or chattel paper need not be brought within the regulatory scheme of the Bill. Section 4(g) embodies this conclusion.

9. Sections 4(h), 4(i) and 4(j) exclude from the scope of the Bill miscellaneous assignments which are either of no commercial significance or are of a type of which regulation in the manner prescribed in the Bill would be inappropriate.

Validity of security interests

5(1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of

(a) a security interest in goods, and

(b) a possessory security interest in securities, instruments, negotiable documents of title, money or chattel paper,

shall be governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

(2) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province

(a) not later than 60 days after the goods are brought into the Province,

(b) not later than 15 days after the day the secured party receives notice that the goods have been brought into the Province, or

(c) prior to the date that perfection ceases under the law of the jurisdiction in which the goods are situated at the time the security interest attached,

whichever is the earliest, but if the goods are consumer goods, the security interest is subordinate to the interest of a buyer of those goods who acquires the goods as consumer goods without knowledge of the security interest and before the security interest is perfected in the Province.

(3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected in the Province under this Act.

(4) If a security interest mentioned in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act.

COMMENT:

1. Bill 73, unlike any existing Alberta personal property legislation, contains an extensive, although not exhaustive, set of conflict of law rules to deal with the most significant choice of law questions which arise in connection with personal property security transactions.

2. Under section 5, the law applicable to questions of validity and perfection of a security interest in goods, other than goods of a type described in section 7, is that of the situs of the goods at the time the security interest attaches. As to attachment, see section 11. The same choice of law rule is applied in cases of possessory security interests in securities, instruments, negotiable documents of title, money and chattel paper.

3. Section 5(2) is a modified version of provisions found in current Alberta personal property security legislation. It prescribes the conditions which must be met if continued perfection of a foreign security interest is to be recognized in Alberta once the collateral has been brought into this province. The period of temporary perfection without registration in Alberta or possession by the secured party is limited. Under section 5(2)(c) the period may be truncated by expiry of perfection in the jurisdiction where the goods, securities, instruments, negotiable documents of title, money and chattel paper situated when the security interest attached. If not perfected in that jurisdiction, the security interest is given no period of temporary perfection in Alberta.

4. Section 5(2) states a special rule in cases where the collateral taken under the foreign security interest is consumer goods. The term "consumer goods" is not a generic description of a type of collateral; it indicates the use being made of the goods. See commentary to section 1(1)(d.1). Accordingly, any person acquiring goods as consumer goods without knowledge of a foreign security interest in them and before that interest is perfected by registration in Alberta takes free from the foreign security interest. In other words, in such a situation there is no period of temporary perfection in Alberta without registration in this province or possession of the goods by the secured party. This provision reverses the policy presently contained in section 14 of the Conditional Sales Act R.S.A. 1980, c. C-21 and section 12 of the Bills of Sale Act R.S.A. 1980, c. B-5 which in similar circumstances give unqualified protection to foreign security interests for a specified period of time.

Conflict of laws

6(1) Subject to section 7,

(a) if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and

(b) if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches,

the validity, perfection and effect of perfection or non-perfection of the security interest shall be governed by the law of the other jurisdiction.

(2) If the goods are removed to another jurisdiction, but the goods are later brought into the Province, the security interest in the goods is deemed to be a security interest to which section 5(2) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

COMMENT:

This section states a special choice of law rule in situations where the parties to the security agreement understand at the date of attachment that the goods will be taken to another jurisdiction and the goods are actually taken there by the debtors. It makes little sense to subject the transaction to the law of the situs of the goods at the date of attachment. The more appropriate law is that of the jurisdiction to which the goods have been taken.

Validity of intangibles and non-possessory security interests

7(1) For the purposes of this section, a debtor is deemed to be located

(a) at his place of business, if he has a place of business,

(b) at his chief executive office, if he has more than 1 place of business, and

(c) at his place of residence, if he has no place of business.

(2) The validity, perfection and effect of perfection or non-perfection of

(a) a security interest in

(i) an intangible, or

(ii) goods that are of a type that are normally used in more than 1 jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others, and

(b) a non-possessory security interest in securities, an instrument, a negotiable document of title, money and chattel paper,

shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches.

(3) If a debtor changes his location to another jurisdiction or transfers his interest in collateral to a person in another jurisdiction, a perfected security interest referred to in subsection (2) continues perfected in the Province if it is perfected in the new jurisdiction

(a) not later than 60 days from the day the debtor changes his location or transfers his interest in collateral to a person in another jurisdiction,

(b) not later than 15 days from the day the secured party receives notice that the debtor has changed his location or transferred his interest in collateral to a person in another jurisdiction, or

(c) prior to the day that perfection ceases under the law of the first jurisdiction,

whichever is earliest.

(4) If the jurisdiction in which a debtor is deemed to be located does not provide for the public registration or recording of a security interest referred to in subsection (2) and the collateral is not in the possession of the secured party, a security interest in the collateral that is not perfected under this Act is deemed to be an unperfected security interest in relation to an interest in the collateral acquired by a person in the Province.

(5) A security interest that is deemed to be unperfected under subsection (4) may be perfected under this Act.

(6) Notwithstanding section 6 and subsection (2), the validity, perfection and effect of perfection or non-perfection of a security interest that

(a) is created by a debtor who, before extraction, has an interest in minerals, and

(b) attaches in respect of the minerals upon extraction, or attaches to an account resulting from the sale of them at the wellhead or minehead,

is governed by the law of the jurisdiction in which the wellhead or minehead is located.

(7) Notwithstanding this section and sections 5 and 6,

(a) all procedural issues involved in the enforcement of the rights of a secured party against collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of such rights,

(b) all procedural issues involved in the enforcement of the rights of a secured party against intangibles are governed by the law of the forum, and

(c) all substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

COMMENT:

1. Section 7(1) states a special choice of law rule in situations where situs is of little value as a connecting factor. This is the case where the collateral is an intangible or goods of a type normally used in more than one jurisdiction and held by the debtor as equipment or leasing inventory. It is also the case where a non-possessory security interest in securities, an instrument, a negotiable document of title, money or chattel paper is involved. As an alternative, the section prescribes the place of location of the debtor at the date of the attachment as the fact of determining the applicable law.

2. The operation of sections 7(1) and 7(2) in the context of an assignment of accounts is displayed in the following scenario. Assume that a secured party (SP) takes a security interest in accounts (intangibles) owned by the debtor (D) and owing by D's customers. D has its chief executive office in Ontario at the date of attachment of the security interest. However, the accounts are earned by D through its Alberta branch office and the account debtors are located in Saskatchewan and Alberta. SP's security interest in the accounts is governed by Ontario law and perfection of it in Ontario is recognized in Alberta and Saskatchewan. Registration of the security interest in Alberta or in Saskatchewan is not necessary nor does it have any effect. Third parties dealing with D must be aware of the necessity to conduct a search of the Ontario registry.

3. Note that the special choice of law rule of sections 7(1)and 7(2) applies to security interests in goods that are of a type normally used in more than one jurisdiction and held by D as equipment or as leased inventory. Accordingly, if SP takes a security interest in a fleet of long haul trucks owned by D who has its chief executive office in Winnipeg, the applicable law is Manitoba, even though some of the trucks are used exclusively in Alberta by D. The choice of law is based on the type of collateral not on the determination whether or not particular items of collateral are actually used by the debtor in more than one jurisdiction.

4. Special note should be taken of section 7(4) which qualifies the choice of law rule of section 7(2). If the applicable law as determined by section 7(2) is that of a jurisdiction which does not provide for the registration of the type of security interest involved, the security interest must be registered in Alberta. Accordingly, in the scenario described in paragraph 2 above, if the applicable law is that of British Columbia and the assignment involves only accounts becoming due under specified contracts, the security interest would have to be perfected in Alberta in order to obtain protection against an interest in the accounts acquired by a person in Alberta. The reason for this is that the assignment involved is not of a type which must be registered under the law of British Columbia.

5. Section 7(6) specifies a choice of law rule for security interests in minerals in cases where the debtor owns an interest in the minerals before extraction and the security interest attaches upon extraction. The rule also applies to a security interest in accounts resulting from the sale of the minerals at the well head or mine head. If, however, security interest in the minerals attaches after extraction or the security interest is in accounts arising from sale of the minerals other than at the well head or mine head, the applicable choice of law rules will be those stated in sections 5 and 7(2) respectively.

6. Section 7(7) codifies existing common law principles which prescribe choice of law rules where inter partes enforcement issues are involved.

PART 2
VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

Effectiveness of a security agreement

8 Subject to this Act or any other Act, a security agreement is effective according to its terms.

COMMENT:

This section declares a basic policy of the legislation: parties are given as much freedom as possible to tailor the transactions to their own needs free from the conceptual and structural constraints of former law. However, this freedom is qualified to some extent; for example, see sections 12(3), 15, 40(6), 57(5) and 65(3).

Enforceability of security interest

9(1) Subject to subsection (2), a security interest is not enforceable by a secured party against a person other than the debtor unless

(a) the collateral is in the possession of the secured party, or

(b) the debtor has signed a security agreement that contains

(i) a description by item, if the security agreement provides for a security interest in specific items of collateral,

(ii) a description by type, if the security agreement provides for a security interest in types of collateral,

(iii) a statement to the effect that the security agreement provides for a security interest in all of the debtor's present or after-acquired personal property, if the security agreement so provides, and

(iv) a statement to the effect that the security agreement provides for a security interest in all of the present or after-acquired personal property except specific items or types of collateral, if the security agreement so provides, and a description of such collateral.

(2) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds.

COMMENT:

1. This section prescribes a writing requirement for security agreements in cases where a pledge is not involved. Note, however, the requirement is not a modern Statute of Frauds in that the lack of a written record of a security agreement does not affect the enforceability of the agreement between the secured party and the debtor. Oral security agreements or written ones which do not comply with the requirements of this section are unenforceable only as against third parties.

2. Section 9(1) contains extensive guidance as to how the collateral is to be described in a security agreement. A description by item would be used if specific individually identifiable items of collateral are involved. Where the security agreement provides for inventory financing, a generic or "type" description is likely to be used. Accordingly, a secured inventory financing agreement involving a retail seller of new and used motor vehicles might describe the collateral as "automobiles, trucks and other motor vehicles". Note that there is no requirement that specific motor vehicles be identified or that a particular number of motor vehicles be specified. Where the circumstances are such that under current law a floating charge would be used and the collateral would be described in such charge as "the undertaking" of the corporate debtor, the security agreement might contain a "all present and after-acquired property" description or might describe the collateral as all present and after-acquired personal property with the exception of enumerated items or types of property.

Section 9(2) makes it clear that there is no need to describe proceeds collateral in the agreement. As to proceeds collateral see sections 1(1)(p) and 26(2).

3. Except in cases where serial number is a required feature of the collateral description for registration purposes, a description contained on a security agreement can be transcribed to the financing statement. Collateral description requirements for financing statements will be prescribed by regulation.

Delivery of copy of security interest

10 Not later than 10 days after the execution of a security agreement, the secured party shall deliver a copy of the security agreement to the debtor, and if he fails to do so after a request by the debtor, the Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.

Attachment of security interests

11(1) A security interest attaches when

(a) value is given,

(b) the debtor has rights in the collateral, and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 9,

unless the parties intend it to attach at a later time, in which case it attaches in accordance with the intention of the parties.

(2) Without limiting the generality of subsection (1)(b), the debtor is deemed to have rights in

(a) goods purchased by him under an agreement to sell, when he obtains possession of the goods pursuant to the sales contract, and

(b) goods leased or hired by him or consigned to him, when he obtains possession of the goods pursuant to the lease, hiring agreement or consignment, as the case may be,

but is deemed not to have rights in

(c) crops until they become growing crops,

(d) the young of animals until they are conceived,

(e) minerals until they are extracted, and

(f) timber until it is cut.

COMMENT:

1. While the word "attach" is not part of the terminology of traditional Canadian personal property security law, the concept is. Essentially, a security interest is created or comes into existence when it attaches.

2. Section 11(1) sets out the pre-requisites to attachment. The secured party must have given value to or for the benefit of the debtor. "Value" is defined in section 1(1)(z) as meaning any consideration sufficient to support a simple contract as well as an antecedent debt or liability. In most cases, the value given by the secured party is a promise to grant credit or to make a loan. Since antecedent debt is good consideration, an unsecured obligation can be converted into a secured obligation. Compare Bank Act S.C. 1980, c. 40, s. 180(1).

3. Another pre-requisite to attachment is that the debtor has rights in the collateral. This is nothing more than the well-known common law principle: nemo dat quod non habet. By definition, a creditor claiming the status of a secured party must acquire a "security interest" which is an interest in collateral. Section 1(1)(v). If the debtor has no interest in the collateral, no attachment can occur and the debt or obligation cannot be secured. However, there is nothing in section 11(1) which suggests that the security interest is created by the transfer of the debtor's rights in the collateral to the secured party. Unless postponed by agreement, attachment occurs automatically when the requirements of section 11(1) have been met.

The debtor need not have a legal title to the collateral, although he must have more than a mere possessory right to it. It is an open question as to whether or not a power to dispose of the property interest in the goods such as that given by the Factors Act, satisfies the requirement of section 11(1)(b).

Section 11(2) deems the debtor to have rights in the collateral in two situations. The first is when the debtor has purchased goods under an agreement to sell which provides that title and property remain in the seller until certain conditions are met. Under sections 3(4) and 20 of the Sale of Goods Act R.S.A. 1980, c. S-2, property in goods passes to a buyer under an agreement for sale in accordance with the terms of the contract. Section 11(2)(b) is designed to preclude the conclusion that although the seller has a security interest, it cannot attach until the debtor pays the full purchase price since it is only then that he acquires any proprietary interest in the collateral.

Section 11(2)(b) deals with the same problem in a different context. The Bill applies to certain types of consignments and chattel leases which are not security agreements. See sections 3(b), 1(1)(d) and 1(1)(1.1). At common law a consignee or lessee of chattels acquired at most a special property interest which would not likely qualify as "rights in the collateral" as required by section 11(1)(b). In the absence of section 11(2)(b) the courts may be forced to conclude that a deemed security interest in leased or consigned property could not attach.

Clauses (c) to (f) of section 11(2) provide further elucidation of section 11(1)(b) in the context of particular situations. Clauses (c) and (d) should be applied in a positive as well as a negative way. The Bill is stating by negative inference that a debtor can have rights in crops before they are harvested and in the young of animals as soon as they are conceived.

4. Section 11(1)(c) makes enforceability a pre-requisite to attachment. However, since non-compliance with section 9 results in a security agreement being unenforceable only as against third parties, a security interest arising under an oral or inadequately written security agreement attaches to the extent necessary to permit the secured party to enforce rights given to him in Part 5.

5. The requirements of attachment need not be fulfilled in any particular order. While attachment is ordinarily automatic, the parties may postpone it by agreement.

6. Section 3(a) includes the floating charge in the list of transactions to which the Bill applies, and section 65(5) declares that the principles of the common law and equity supplement the Bill except insofar as they are inconsistent with its express provisions. A floating charge is a non-specific equitable mortgage. While it has been described by the courts as a "present security", it is viewed as being ambulatory and shifting in nature. See Illingworth v. Houldsworth (1904) A.C. 355 per Lord Macnaghten at page 358. The charge holder "cannot affirm that the assets are specifically mortgaged to him". The charge cannot be viewed as "specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fix charge". See Evans v. Rival Granite Quarries (1910) 2 K.B. 976 per Buckley L.J. at page 999.

It is clear that the conceptual basis of the floating charge will not survive transition to the new regime embodied in Bill 73. Parties to a security agreement are free to create any type of security interest they wish; but a fair reading of the Bill does not permit the conclusion that the use of the labelled "floating charge" or the use of standard floating charge provisions imports the complex matrix of third party priority rules which the courts of equity developed in the context of floating charges. The Bill provides little scope for the parties to select the law applicable to their security agreement merely by using a particular form of contracts. It recognizes two legal states for security interests: attached but unperfected and perfected. The Bill does not recognize a perfected, but non-specific or floating security interest. If the parties, by agreement, postpone attachment, the secured party's interest is unperfected until attachment; it is not a non-specific present interest with a quasi-perfected status. If the parties intend attachment when the debtor gets rights in the collateral, or are silent on the point, the secured party's interest becomes a specific, fixed security interest once the other conditions of attachment are fulfilled. The use of a floating charge form of security agreement is not evidence of an intention on the part of the parties to postpone attachment.

The conversion of a floating charge to a specific charge which occurs under Bill 73 results in functional as well as conceptual changes in the nature of the floating charge. Crystallization, so important to the priority position of a charge holder under equitable law, has no similar significance under the Bill. Priority is determined on the basis of statutory rules that make no mention of crystallization or any similar concept. Since the charge is specific, unsecured parties cannot gain priority over the charge by completing judgment enforcement measures prior to crystallization. Since the floating aspect of the charge no longer exists, there is no need to include the standard clauses restricting the debtor's right to create other charges ranking in priority to or pari passu with the charge.

After-acquired collateral

12(1) Except as provided in subsection (3), a security agreement may cover after-acquired property.

(2) A security interest in after-acquired property attaches in accordance with section 11, without the need for specific appropriation.

(3) A security interest does not attach under an after-acquired property provision in a security agreement

(a) to crops that become crops more than 1 year after the security agreement has been executed, except that a security interest in crops that is given in conjunction with a lease, purchase or mortgage of land may, if so agreed, attach to crops to be grown on the land concerned during the term of the lease, purchase or mortgage, or

(b) to consumer goods, other than accessions, unless the debtor acquires rights in them not later than 15 days after the secured party gives value.

COMMENT:

1. This section is a central feature of the system contained in the Bill designed to facilitate inventory, accounts receivable and other forms of financing where the debtor does not have an interest in all or part of the collateral described in the security agreement at the date of its execution.

2. Section 12(2) is designed to make it clear that a complete security interest in after-acquired property arises automatically so long as the parties so intend. Existing law permits parties to make security agreements covering property to be acquired by the debtor at some future time. However, at common law, in order for the creditor to acquire a security interest in the property, it is necessary for the debtor to make a specific appropriation of the property to the security agreement after he acquires it. At equity, the specific appropriation is not required, but the interest which automatically transfers to the secured party when the property is acquired is equitable only, and, as such, is inferior. Both these deficiencies in existing law are remedied by this section.

3. Section 12(3) states two limitations on the efficacy of after-acquired property clauses. These limitations are based on public policy considerations and are designed to ensure that persons in weak bargaining positions are not forced to encumber future assets when it would be unwise to do so. The limitations may be thought to be too paternalistic. No equivalent limitation is placed on security interests taken by charter banks under section 178 of the Bank Act. A provision equivalent to section 12(1)(2) in the 1962 Official Text of U.C.C. article 9 was deleted for this reason from the 1972 Official Text. However, all Canadian Personal Property Security Acts contain provisions similar to section 12(3). The Minister's Advisory Committee on the Ontario Personal Property Security Act which reported in 1984 did not recommend repeal of the provision.

Future advances

13(1) A security agreement may secure future advances whether or not the advances are given pursuant to an obligation in the security agreement.

(2) Unless the parties otherwise agree, no obligation to make future advances is binding on a secured party if the collateral has been seized, attached, charged or made subject to an equitable execution under circumstances described in section 19(1)(a) and the secured party receives notice of the fact.

COMMENT:

1. This section removes any doubt concerning the efficacy of clauses in security agreements which provide that advances be made during the life of the agreements. As to the scope of the term "future advance" see section 1(1)(i.1). The important issue in future advance financing is whether or not the law will recognize the right of the secured party to tack future advances so as to have a priority status with respect to the future advances which he has with respect to advances made at the date of execution of the agreement. In this regard see section 33(3) which so provides where priority is claimed over a security interest perfected after the first advance and before the later advance. This priority is not dependent on whether the future advance is obligatory or discretionary.

2. Tacking is not recognized where the intervening interest is that of an unsecured party who, to the knowledge of the secured party, has caused the collateral to be seized. See section 33(4)(b). The purpose of section 13(2) is to relieve a secured party in such circumstances from any legal obligation to make future advances.

Seller's warranties

14 Where a seller retains a purchase money security interest in goods,

(a) the law relating to contracts of sale governs the sale and any disclaimer, limitation or modification of the seller's conditions and warranties, and

(b) the conditions and warranties in a sale agreement shall not be affected by a security agreement.

COMMENT:

Agreements to sell goods (conditional sales contracts) have two aspects: a sales aspect and a security aspect. This section is designed to eliminate any doubt as to the law applicable to the sales aspect. As to the definition of purchase money security interest, see section 1(1)(q).

Acceleration of payment or performance

15 Where a security agreement provides that the secured party may accelerate payment or performance if he considers that he is insecure or that the collateral is in jeopardy, the provision shall be construed to mean that the secured party has the right to do so only if he, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy.

COMMENT:

Acceleration clauses are a standard feature of security agreements. Some of these clauses contemplate acceleration on the basis of an event, the occurrence of which can be objectively established. Others give, to the secured party, the power to accelerate the obligation on the basis of a subjective determination. This section is designed to prescribe an objective rather than a subjective test for the invocation of acceleration clauses. It adopts the tests of good faith and commercial reasonableness which are expressly or implicitly embodied in other sections of the Bill. See section 65(1).

Preservation of collateral

16(1) A secured party shall use reasonable care in preserving the collateral in his possession and, unless the parties otherwise agree, in the case of an instrument, securities or chattel paper, reasonable care includes taking necessary steps to preserve rights against other parties.

(2) Unless the parties otherwise agree, if collateral is in the possession of a secured party,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in the obtaining, maintaining possession of and preserving the collateral, are chargeable to the debtor and are secured by the collateral,

(b) the risk of loss or damage, except if caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage,

(c) the secured party may hold as additional security any increase or profits, except money, resulting from the collateral, and money so received, unless remitted to the debtor, shall be applied forthwith on its receipt in reduction of the secured obligation,

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled, and

(e) the secured party may create a security interest in the collateral on terms that do not impair the debtor's right to redeem it.

(3) A secured party who fails to meet any obligations imposed by subsection (1) or (2) is liable for any loss or damage caused by his failure, but he does not lose his security interest.

(4) A secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement,

(b) for the purpose of preserving the collateral or its value, or

(c) pursuant to an order of the Court

(i) before which a question relating to the collateral is being heard, or

(ii) on application with notice to all persons concerned.

COMMENT:

1. This section sets out the rights and obligations of a secured party in possession of collateral under a pledge or as a result of seizure of collateral in exercise of rights given in Part 5.

2. The obligation set out in section 16(1) to use reasonable care while in possession of collateral cannot be disclaimed by the secured party. See section 57(5).

Request for statement from secured party

17(1) The debtor, a creditor, a sheriff or a person with a legal or equitable interest in the collateral may, by a demand in writing containing an address for reply and sent by registered mail or delivered to the secured party at the address set forth in the security agreement or the financing statement, or at a more recent address if known, require the secured party to send or deliver to any person at the address specified in the demand or, if the demand is made by the debtor, to a person at an address specified by the debtor, any one or more of the following:

(a) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness, as of the date specified in the notice;

(b) a written approval or correction, as of the date specified in the notice, of the itemized list of the collateral attached to the notice;

(c) a written approval or correction, as of the date specified in the demand, of the amount of the indebtedness and of the terms of payment of the indebtedness;

(d) a copy of the security agreement;

(e) sufficient information as to the location of the security agreement and any amendments to it and any copy of the security agreement and any amendments to it to enable a person entitled to receive a copy of the security agreement, or his authorized representative, to inspect it, if he so desires.

(2) The demand mentioned in subsection (1) may be served in accordance with section 70 or by registered mail addressed to the address of the secured party as it appears on the security agreement or financing statement.

(3) Where a demand is served in accordance with subsection (1)(b) and the secured party claims a security interest in all of the collateral or a particular type of collateral in which the debtor has rights, he may so indicate in lieu of approving or correcting the itemized list of such collateral.

(4) The secured party shall reply to a demand served under subsection (1) not later than 10 days after it is served and if, without reasonable excuse, he fails to do so or his reply is incomplete or incorrect, the person who has served the demand is entitled, in addition to any other remedy provided by this Act, on notice to the secured party, to apply to the Court for an order requiring the secured party to comply with the demand.

(5) If a secured party fails to comply with an order granted under subsection (4), the Court, on application of the party who obtained the order, on notice to the secured party, may

(a) declare the security interest of the secured party void and order registration of the secured interest removed from the Registry, or

(b) make any order that it considers necessary to ensure compliance with the order.

(6) Where the person receiving a demand under subsection (1) no longer has an interest in the obligation or collateral, he shall, not later than 10 days after he receives the demand, disclose the name and address of the latest successor in interest if known to him, and, if without reasonable excuse he fails to do so or his reply is incomplete or incorrect, subsections (4) and (5) apply.

(7) On application of the secured party or on an application under subsection (4), the Court may make any order that it considers reasonable and just, including an order

(a) exempting the secured party in whole or in part from complying with the demand, or

(b) extending the time for answering the demand.

(8) The secured party may require payment in advance of the charges prescribed for each reply to a demand under subsection (1), but the debtor is entitled to a reply without charge once every 6 months.

(9) The secured party is not required to provide a copy of any financing statement registered in the Registry.

COMMENT:

1. This section is a key aspect of the notice registration system prescribed in Part 4. Under the system a financing statement and not a copy of the security agreement is tendered for registration by the secured party. See sections 1(1)(h) and 41. A financing statement contains only basic information such as the name and address of the secured party, the name and address of the debtor and a description of the collateral. Details of the security agreement such as the particular items of collateral involved, the amounts secured and the debtor's payment obligations are not in the public record. This information must be obtained directly from the secured party. Section 17 provides the mechanism through which this can be accomplished.

2. Section 44 permits anyone, who pays the appropriate fee and who follows the prescribed procedure, to obtain a search result disclosing information contained on a financing statement. However, the range of persons who are entitled to obtain details concerning a security agreement is limited by section 17(1) to: the debtor, a creditor, a sheriff and a person with an interest in the collateral. The reason for inclusion of the debtor and a person with an interest in the collateral is obvious. Unsecured parties and the sheriff are included since the nature and extent of security interests in property of a debtor are important factors in any determination as to whether or not to proceed with judgment enforcement measures.

3. A credit grantor who has not entered into a security agreement which gives him rights in the collateral described in a financing statement does not have the right to demand and obtain information from a secured party who has registered the financing statement. If the credit grantor wishes to determine the nature and extent of any security interest in property in which he intends to acquire a security interest, he must require his prospective customer, the debtor, to make the appropriate demand. Section 17(1) facilitates this by giving to the debtor the right to require that the secured party send or deliver the reply to any person at the address specified by the debtor. Under this procedure, the information goes directly to the credit grantor and need not go through the hands of the debtor.

4. The person making the demand has a legal right to the information sought. Failure to respond to a demand can result in a judgment for damages. See section 65(2). Failure to respond to an order of a court requiring compliance with a demand can result in loss of perfection or loss of the security interest. See section 17(5). However, a court is given power to exempt the person from compliance or to extend the period of time for reply.

PART 3
PERFECTION AND PRIORITIES

Perfection of security agreement

18 A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed, regardless of the order of occurrence.

COMMENT:

1. This section introduces the concept of "perfection" which is a legacy of the American origins of the Bill.

2. The term "perfection" as used in the Bill can be a bit misleading. It refers to a status which a security interest must acquire if it is to avoid subordination to most other interests in the same collateral. While etymologically the term derives from "perfect", a perfected security interest may not have a first priority or be in an invulnerable position. All that "perfection" connotes in the context of the Bill is that a security interest exists (it has attached) and such measures have been taken as are necessary to put the interest in the position to compete with other interests.

3. An attached security interest can be perfected by registration regardless of the nature of the collateral and by possession where certain types of collateral are involved (sections 22 and 25). It may also be temporarily perfected without registration or possession in certain prescribed situations (sections 5(2), 7(3), 24, 26(3), 27(4), 55(1) and 55(2). See also sections 20 and 32(1.1))

4. The section makes it clear that perfection arises automatically at the moment of coincidence of attachment and the chosen perfection step (registration, possession or temporary perfection). The order of occurrence of attachment and the perfection step is not important. Accordingly, if a financing statement is registered and later the debtor and the secured party execute a security agreement, but still later the debtor gets rights in the collateral, perfection occurs at the moment those rights are acquired.

5. The time of perfection does not necessarily determine the order of priority of security interests. For example, under section 33(1), a security interest may be first perfected but may have second priority to a security interest registered earlier, but perfected later. Perfection is a necessary, but not a sufficient, element of first priority status.

Priority of unperfected and certain perfected security interests

19(1) A security interest

(a) in collateral is subordinate to the interest of

(i) a person who causes the collateral to be seized under legal process to enforce a judgment including execution, attachment or garnishment or who obtains a charging order or equitable execution affecting or relating to the collateral,

(ii) a person entitled by law to participate in the distribution of property or its proceeds seized under legal process,

(iii) a sheriff who has seized or has obtained a right to the collateral under the *Execution Creditors Act*, and

(iv) a representative of creditors, but only to the extent that such person represents persons mentioned in subclause (i),

if that security interest is unperfected at the time the interests of the persons mentioned in subclauses (i) to (iv) arise;

(b) in collateral is not effective against a trustee in bankruptcy if the security interest is unperfected at the date the trustee's status has effect;

(c) in chattel paper, a document of title, a security, an instrument or goods is subordinate to the interests of a transferee thereof if he

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value for his interest,

(iii) acquires the interest without notice of the security interest,

(iv) receives delivery, and

(v) acquires his interest before the security interest is perfected;

(d) in intangibles other than accounts is subordinate to the interest of a transferee of them if he

(i) acquires the interest under a transaction that is not a security agreement;

(ii) gives value for his interest;

(iii) acquires the interest without notice of the security interest;

(iv) acquires the interest before the security interest is perfected.

(2) Collateral is seized through garnishment within the meaning of subsection (1)(a)(i) when a garnishee summons binds the collateral.

COMMENT:

1. This section prescribes a set of priority rules applicable to a dispute between a holder of a security interest and unsecured party or transferee of the collateral who acquired an interest in the collateral before the competing security interest is perfected.

2. Existing Alberta personal property security law makes an unregistered chattel mortgage void as against creditors and, for the purposes of enforcing the rights of such creditors, an assignee for the benefit of creditors and the trustee in bankruptcy. See Bills of Sale Act R.S.A. 1980, c. B-5, ss. 1(e) and 2. The Conditional Sales Act prevents a seller who has failed to register his conditional sales contract from asserting his proprietary or possessory rights against judgments, executions or attachments against the buyer. See Conditional Sales Act R.S.A. 1980, c. C-21, s. 2. The disparity in the two approaches contained in this legislation is indicative of the lack of a consistent policy which has prevailed for many years in most Canadian jurisdictions concerning the position of unsecured parties and the trustee in bankruptcy vis-a-vis unregistered security interests.

There are three grounds upon which to base the decision to make an unperfected security interest subordinate to unsecured parties of the debtor:

(1) The assumption that credit is extended to the debtor in the belief that his apparently unencumbered assets can be seized if he defaults in repayment;

(2) The assumption that a creditor makes the decision to incur the costs of obtaining a judgment and judgment enforcement measures only if he is satisfied that the exigible assets of the debtor are not encumbered by security interests;

(3) A creditor who goes to the expense and trouble to employ successfully a judgment enforcement measure should be viewed as having a status similar to that of a secured party. Section 19(1) embodies ground (3). Grounds (1) and (2) involve assumptions which may or may not be valid in particular cases. Under section 19 a creditor, who is able to have the collateral seized or charged under judicial process before a security interest in it is perfected, is treated for these limited purposes having the equivalent of a perfected security interest in the collateral vis a-vis an unperfected security interest. As is the case with competition among secured parties, knowledge of the existence of a prior unperfected security interest is not relevant in determining priority. See section 33(1).

3. The section addresses only the issue as to priority between a prior security interest and the interest of an unsecured party acquired after the security interest is taken and before it is perfected. It does not deal with priorities where the interest of the unsecured party is acquired before the security interest has been taken. In this regard see Seizures Act R.S.A. 1980, c. S-11, s. 4.

4. Sections 19(1)(a)(ii) and (iii) are designed to accommodate the system established under the Execution Creditors Act R.S.A. 1980, c. E-14. Under this system money levied under a writ of execution, equitable execution, attachment or attached under garnishee proceedings are distributed among a specified group of creditors. Accordingly, section 19(1)(a)(ii) recognizes the priority rights of such persons. Further, the Execution Creditors Act gives independent power to the sheriff to seize or otherwise obtain property belonging to the debtor. Section 19(1)(a)(iii) recognizes this independent status with the result that the sheriff need not show that he is acting on behalf of any particular unsecured party when he asserts priorty over an unperfected security interest.

5. Section 19(1)(b) makes it clear that the trustee in bankruptcy occupies an independent, and not a representative position. In other words, in order to assert priority over an unperfected security interest he need not establish that anyone of the creditors who has filed claims in the bankruptcy proceedings could himself have subordinated the security interest under section 19(1)(a)(i). The justification for giving to the trustee this independent status is based on the view that bankruptcy proceedings are just another method through which an unsecured party enforces a money judgment. If bankruptcy is invoked before a security interest is perfected, a measure equivalent to those described in section 19(1)(a)(i) has been taken. Further, once a bankruptcy assignment or petition for a receiving order has been filed, unsecured parties are precluded from using provincial judgment enforcement measures to gain priority under section 19(1)(a)(i). See Bankruptcy Act R.S.A. 1978, c. B-3, s. 50(1). It is only reasonable that the one measure left to them, bankruptcy proceedings, has the same legal effect as provincial judgment enforcement measures.

6. Sections 19(1)(c) and (d) subordinate an unperfected security interest to the interests of transferees of the collateral who meet the specified requirements. The effect of these sections is to allow transferees for value, other than secured parties, to rely on the information disclosed in the Personal Property Registry when determining whether or not the property they are acquiring is encumbered by a security interest.

Priority of a purchase money security interest

20 A purchase money security interest in

(a) collateral, other than an intangible, that is registered not later than 15 days after the day

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is the earlier, or

(b) an intangible that is registered not later than 15 days after the day the security interest attaches

has priority over the interests of persons mentioned in section 19(1)(a).

COMMENT:

1. This section should be read along with several other sections which provide a "grace period" for perfection of purchase money security interests. See sections 1(1)(q), 32(1.1), 34(4) and 35(4). Where one of the specified interests is in competition with a purchase money security interest, priority is given to the purchase money security interest even though it is registered after the competing interest arises or is perfected, so long as the purchase money security interest is perfected within the time specified.

Section 20 deals with priority competitions between a purchase money security interest and an unsecured party, a sheriff or a trustee in bankruptcy. Its effect is to give a grace period of 15 days after delivery of possession of the goods or after attachment of the security interest in intangibles to perfect the security interest in the collateral. Accordingly, if goods which are collateral under a purchase money security interest are seized under a writ of execution before perfection of the security interest, section 19(1)(a)(i) cannot be relied upon by the execution creditor as a basis for claiming priority if the purchase money security interest is perfected within 15 days from the date the debtor obtains possession of the goods.

2. It should be noted that there is no section of the Bill which gives a grace period to a holder of a purchase money security interest where the competing interest is that of a buyer of the collateral. There is no direct equivalent in the Bill to sections 2 and 3 of the Conditional Sales Act R.S.A. 1980, c. C-21 which gives a 30 day grace period for registration of conditional sales contracts, effective against good faith buyers who acquire the collateral before registration of the conditional sales contracts. Under the Bill, any good faith transferee described in section 19(1) takes priority over an unperfected purchase money security interest in the property acquired. See also section 28(5) which provides equivalent protection where periods of temporary perfection are involved.

Continuity of perfection

21(1) If a security interest is originally perfected under this Act and is again perfected under this Act without an intermediate period during which it is unperfected, the security interest is deemed to be continuously perfected for the purposes of this Act.

(2) An assignee of a security interest has the same priority with respect to perfection of the security interest as the assignor had at the time of the assignment.

COMMENT:

This section is made necessary because of the fact that there are three methods by which a security interest in some types of collateral can be perfected: registration, possession and temporary perfection without registration or possession. Because of the nature of a particular type of financing, it may be necessary to use at different stages two or three different methods to perfect the security interest in collateral. This section merely ensures that, for the purposes of determining priorities, a change in method of perfection does not affect an established priority status. The operation of the section is illustrated in the following example. A bank which has agreed to provide financing to a merchant customer honours drafts drawn on it and receives possesion of a negotiable bill of lading covering goods purchased by the customer. The bank has a security interest in the negotiable document of title which is perfected by possession. See section 22(1)(e). The bank releases the bill of lading to the customer (debtor) so that he can obtain possession of the goods from the carrier. The bank has a temporary perfected security interest in the document and the goods for 15 days. See section 24(2)(b). The bank registers its interest in the goods before the expiry of the 15 day period. The bank continues to have a perfected security interest in the goods until they are sold by the merchant. After sale, the bank has a security interest in the proceeds of the sale, initially by operation of the law and, then, by registration. See section 26(2). If the successive stages of the bank's security interest succeed each other without a intervening gap, the security interest is perfected continuously, and the date of perfection is when the bank first became perfected by possession of the bill of lading.

Perfection by possession

22(1) Subject to section 18, possession of the collateral by the secured party, or on his behalf by a person other than the debtor or the debtor's agent, perfects a security interest in

(a) chattel paper;

(b) goods;

(c) instruments;

(d) securities;

(e) negotiable documents of title;

(f) money,

but, subject to section 21, only while it is actually held as collateral.

(2) For the purposes of subsection (1), a secured party is deemed not to have taken or retained possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.

COMMENT:

By recognizing the possibility of perfecting a security interest in collateral by taking possession of it, this section of the Bill adopts the pledge as a form of security arrangement. All types of collateral capable of being reduced to possession are enumerated. The section includes chattel paper in this list. Under the Bill, chattel paper is treated as a type of collateral itself (section 1(1)(c)) which has a physical existence capable of being reduced to possession. This flows from the fact that in chattel paper financing, the documents representing the underlying transaction are treated as having transferability not unlike that of a negotiable document of title to goods.

Perfection by registration

23 Subject to section 18, registration of a financing statement perfects a security interest in any type or kind of collateral.

COMMENT:

This section permits the use of registration as a method of perfecting a security interest in any type of collateral. This includes highly negotiable collateral such as money and negotiable instruments. On the surface, such a provision may appear to be anomalous, potentially disruptive to negotiability of certain types of collateral, and, perhaps, beyond the legislative power of the Alberta Legislature. However, this is not the case.

Perfection under the Bill whether by registration or otherwise does not guarantee invulnerability or first priority. One method of perfection may be better than another. For example, perfection of a security interest in chattel paper through possession is superior to perfection by registration. See section 29(3). Yet, both methods are permitted by the Bill. See sections 22 and 23. The need to preserve free transferability of negotiable or quasi-negotiable property does not dictate the conclusion that possession can be the only allowable method of perfecting security interests in this type of property. There can be no obstacle to allow perfection of a security interest in negotiable collateral by registration so long as the law recognizes the need to protect the special priority position generally given to transferees of negotiable property. In order to remove any doubt in the matter, good faith transferees of money and good faith purchasers of securities, instruments and negotiable documents of title are given a special priority position under the Bill superior to that of a secured party who has a security interest perfected by registration. See sections 29(1)-(4). The ability to perfect a security interest in negotiable property by registration can be particularly important where the financing arrangement is of a type which under existing law would involve a floating charge on all of the assets of the debtor. Section 23 permits a secured party to register a single financing statement covering a wide range of collateral, including negotiable property, and to have protection against the attack from the trustee in bankruptcy or execution creditors of the debtor. At the same time, free transferability of negotiable and quasi-negotiable property is preserved.

Temporary perfection

24(1) A security interest in instruments, securities or negotiable documents of title is a perfected security interest for the first 15 days after it attaches to the extent that it arises for new value given under a written security agreement.

(2) A security interest perfected under section 22 in

(a) instruments or securities that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registration or transfer, or

(b) a negotiable document of title or goods not covered by a negotiable document of title that are held by a bailee and made available to the debtor by the secured party for the purpose of

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected for the first 15 days after the collateral comes under the control of the debtor.

(3) After the expiration of the periods of time mentioned in subsection (1) or (2), a security interest under this section is subject to the provisions of this Act for perfecting a security interest.

COMMENT:

1. This section sets out one of the circumstances in which a security interest is temporarily perfected without possession or registration. Subsection (1) allows a 15 day period of temporary perfection in cases involving the acquisition of new collateral in the form of instruments, securities and negotiable documents of title. Since this form of collateral is likely to be negotiable, a secured party will in most cases ultimately wish to take possession of it. It is impractical to expect the secured party to perfect by possession as soon as the debtor acquires the collateral. This would require a great deal of strict policing of the debtor's activities. In cases where money loaned is being used to purchase collateral, the secured party cannot withhold advances until the collateral is acquired.

Temporary perfection under subsection (1) can be claimed only in cases where, and to the extent that, new value has been given by the secured party under a written security agreement. This temporary perfection does not, however, affect anyone who acquires the collateral from the debtor through negotiation. See sections 29(3) and (4).

2. Section 24(2) provides for temporary perfection where the secured party, who has perfected by possession, finds it necessary to release the collateral to the debtor in order to allow him to carry on his business. Conceptually there is no need for temporary perfection since secured parties are permitted to register a security interest in the collateral. However, the additional expense involved in registration is not commercially justifiable in view of the very short period of time the secured party's interest remains undisclosed under the temporary perfection system. In any event, any risk to subsequent good faith buyers of the collateral are removed. See section 28(5).

Perfection of security goods in the possession of a bailee

25(1) A security interest in collateral in the possession of a person other than the debtor is perfected by

(a) the issuance of a document of title to goods by a bailee in the name of the secured party,

(b) the perfection of a security interest in the negotiable document of title to goods in a case where a bailee has issued one,

(c) a holding of the goods on behalf of the secured party pursuant to section 22, or

(d) registration under this Act.

(2) The issuance of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A security interest in the negotiable document of title covering goods takes priority over a security interest in the goods otherwise perfected after the goods become covered by a negotiable document of title.

(4) Notwithstanding subsection (3), a perfected security interest in goods takes priority over the security interest in a negotiable document of title covering goods, where the security interest in the goods was registered at the time the security interest in the negotiable document of title was perfected.

COMMENT:

1. This section deals with perfection of a security interest in goods in the possession of a bailee. In practice, it will be important where goods are held by a commercial warehousing corporation. The section provides alternative methods of perfecting the interest in such a case. As to the definition of document of title, see section 1(1)(g). Section 25(1)(c) provides for attornment by the bailee to the secured party.

2. Sections 25(2)-(4) deal with a difficult question as to the legal effect of the issue of a negotiable document of title in the context of perfection. Under some legal regimes, once a negotiable document of title to goods has been issued, property in the goods is "locked up" in the document with the result that the only way to deal with an interest in the goods is to deal with the document. Subsection (2) makes it clear that the mere issue of the document of title does not preclude a security interest in the goods from arising. However, under subsections (3) and (4) priority is given to the person who has a security interest in the negotiable document of title over anyone with a security interest in the goods unless the latter has registered a financing statement relating to the goods before the negotiable document of title was issued.

The net result is that a person seeking to perfect the security interest in goods through an issued negotiable document of title cannot assume that he will have first priority merely because he has a security interest in the negotiable document of title. As well, a person who intends to acquire a security interest in goods in the hands of a bailee must be careful to determine whether or not a negotiable document of title has been issued.

3. Section 29(4) must be read in the light of section 25(4). Under the former section, a holder for value of a negotiable document of title is given priority over a registered security interest in the document itself. It does not give priority, however, over a security interest in the goods registered before the document of title to the goods was issued.

Perfection re proceeds

26(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest in the collateral

(a) continues with respect to the collateral, unless the secured party expressly or impliedly authorized those dealings, and

(b) extends to the proceeds.

(2) A security interest in proceeds is a continuously perfected security interest, if the interest in the original collateral is perfected

(a) by the registration of a financing statement that covers the original collateral and proceeds and contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same type,

(b) by the registration of a financing statement that covers the original collateral and proceeds, if the proceeds are of a type that are within the description of the original collateral, or

(c) by the registration of a financing statement that covers the original collateral and proceeds, if the proceeds consist of money, cheques or deposit accounts in banks or similar financial institutions.

(3) If the interest in the original collateral was perfected other than in a manner mentioned in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days

(a) in the case of tangible property, after receipt of the proceeds by the debtor, or

(b) in the case of an intangible, after the debtor obtains rights in the intangible property,

unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same type or kind.

COMMENT:

1. Section 26(1) states the legally obvious conclusion that unless a secured party has expressly or impliedly authorized dealings with the collateral, the security interest in it is not extinguished by the debtor's disposition of it. However, if the security agreement or the circumstances surrounding the relationship of the parties to the agreement indicate that the debtor has express or implied power to deal with the collateral in such a way as to extinguish the security interest, after such dealing the secured party loses his security interest in the collateral. This section must be read subject to certain qualifications. Generally, a security agreement providing for a security interest in inventory will impliedly, if not expressly, give to the debtor the right to dispose of the inventory in the ordinary course of business. However, even though it does not, the secured party may not be able to rely on section 26(1)(a) to establish a right to have the collateral seized from an ordinary course buyer. See section 28(1). Further, whether a disposition of the inventory is in or out of the ordinary course of business, a good faith buyer for value who takes possession of the collateral has priority if the security interest is not perfected. See section 19(1)(c).

2. Section 26 has another and more important function. It provides a system under which a security interest in original collateral continues in proceeds of collateral. Section 1(1)(p) defines "proceeds" as "identifiable or traceable personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral or proceeds therefrom ...". Section 26(1)(b) declares that a security interest in original collateral extends to proceeds. The operation of this aspect of the section is illustrated in the following scenario. SP takes a security interest in the inventory of motor vehicles owned by D, a dealer in motor vehicles. When D sells an automobile, the proceeds may be in the form of a traded-in automobile, cash, an account or chattel paper. The effect of section 26(1)(b) is to give to SP a security interest in the proceeds, whatever their form. If D sells the traded-in automobile and an account is created, SP has a security interest in the account since proceeds of proceeds are included in the definition of "proceeds".

3. In the scenario set out in the preceding paragraph, the proceeds would be "identifiable" under section 1(1)(p) since each item of proceeds can be related directly to the original collateral. The sale of the new automobile resulted in the receipt by D of identifiable items of proceeds collateral. However, this would not be the cash if cash proceeds received by D from the sale of an automobile were put into a deposit account which at the time of the deposit showed a credit balance to D. The actual cash received by D is handed over to the deposit taking institution and a creditor-debtor relationship is substituted. The cash has ceased to be "identifiable"; however, it may still be "traceable". SP may still be able to establish a security interest in the appropriate portion of the debt owing by the deposit taking institution through invocation of the equitable rules of tracing. This would be so even though after deposit of the cash, a series of credits and debits to the account are made by D. A point is reached, however, when tracing becomes legally impossible. For example, if cash proceeds are used to pay a debt owing by D, SP has no claim against the recipient of the cash. See section 29(2). Difficulties will arise when the deposit taking institution seeks to set-off a debt owing by D against proceeds cash deposits held by it. It is likely that the deposit taking institution will succeed only if it exercises its set-off prior to acquiring notice of SP I's security interest in the deposit account.

4. It is important to note that SP's security interest in the proceeds is not treated as a new security interest for priority purposes. See section 33(5). Accordingly, the security interest in proceeds is viewed as a mere extension of the security interest in the original collateral. See also section 26(2). Further, a purchase money security interest in the original collateral carries over as a purchase money security interest in the proceeds. See sections 32(1) and 32(1.1).

5. A security interest in proceeds must be perfected if it is to be protected against the claims of persons other than the debtor. Section 26(2) prescribes the rules applicable to perfection. The basic approach ,as contained in section 26(2)(a), is that a secured party claiming an interest in proceeds must perfect that interest just as he would be required to do if the proceeds collateral were original collateral. Section 26(3) embodies the recognition that it may not always be possible for a secured party to predict in advance of the disposition of the original collateral the form which the proceeds will take. Thus a secured party is given a 15 day period of temporary perfection. If the proceeds interest is perfected during this period, it is treated as a continuously perfected security interest. Accordingly, in the scenario set out in paragraph 2, if SP registered a financing statement describing proceeds as accounts and chattel paper, but upon sale of an item of inventory D took in trade a farm tractor, SP could acquire a "continuously perfected" status for his security interest in the farm tractor if he registers a financing change statement claiming as proceeds a security interest in the tractor within 15 days from the date D obtained possession of it. Note that the security interest cannot be asserted against a good faith buyer for value who acquires possession of the tractor in a sales contract, whether in or out of D's ordinary course of business. See sections 28(1) and 28(5).

6. Sections 26(2)(b) and 26(2)(c) state exceptions to the requirement that a proceeds interest must be separately perfected. If the proceeds are the type of property within the description of the original collateral, or if the proceeds consist of money, cheques or deposit accounts, there is no need to include on a financing statement or financing change statement a separate description for the proceeds. The assumption underlying these exceptions to the rule of section 26(2)(a) is that the lack of a separate collateral description for these types of proceeds will not mislead persons who obtain registry search results.

Goods returned or repossessed; attachment of security interest

27(1) Where a debtor sells or leases goods that are subject to a security interest, the security interest in the goods reattaches to the goods, if

(a) the buyer or lessee has taken free of the security interest under section 26(1)(a) or 28(1),

(b) the goods are returned to or repossessed by the debtor, and

(c) the secured obligation remains unpaid or unperformed.

(2) Where a security interest in goods reattaches under subsection (1), any question as to

(a) whether or not the security interest in the goods is perfected, and

(b) the time of its perfection or registration

shall be determined as if the goods had not been sold or leased.

(3) If a sale or lease of goods creates an account or chattel paper, and

(a) the account or chattel paper is transferred to a secured party, and

(b) the goods are returned to, or repossessed by, the seller or lessor,

the transferee has a security interest in the goods.

(4) A security interest in goods arising under subsection (3) is perfected if the security interest in the account or chattel paper was also perfected, but the security interest becomes unperfected on the expiration of 15 days after the return or repossession of the goods unless the transferee registers his security interest in or takes possession of the goods before the expiry of that period.

(5) Where a transferee of an account has a perfected security interest in goods under subsection (3) or (4), he is, for the purpose of determining his priority as to the goods, deemed to have perfected his security interest in the goods at the time his security interest in the account was perfected.

(6) Where a transferee of chattel paper has a perfected security interest in goods under subsection (3) or (4),

(a) as between the transferee and the holder of a perfected security interest that reattached under subsection (1), the person who had priority as to the chattel paper also has priority as to the goods, and

(b) as between the transferee and a person other than the holder of a perfected security interest that reattached under subsection (1), the transferee is, for the purpose of determining the transferee's priority as to the goods, deemed to have perfected his security interest in the goods at the time his security interest in the chattel paper was perfected.

COMMENT:

1. This section states a series of rules dealing with security interests in property which cannot be technically classified as proceeds but which come into the possession of debtors under circumstances where it is commercially reasonable to recognize that specified secured parties have the equivalent of a proceeds security interest in the collateral.

2. Section 27(1) states that when a debtor sells or leases goods under circumstances in which the buyer or lessee takes free from a security interest in the goods, the security interest "reattaches" to the goods if they are returned to or repossessed by the debtor at a time when the secured obligation remains unpaid or unperformed. The operation of the section is illustrated in the following scenario. SP I has a security interest in D's inventory of automobiles. D sells an automobile to B, a buyer, who is unsatisfied with it and returns it to D or who fails to pay for it thereby inducing D to have it seized and returned to him. SP I's security interest in the automobile, which was cut off by the sale to B (see section 28(1)), reattaches to the automobile once it is returned to D. Section 27(2) is designed to remove any doubt as to the status of the security interest in the returned or repossessed vehicle. The same result might be produced apart from section 27(1) if SP I has an after-acquired property clause in his security agreement with D.

3. Section 27(3) extends the principle of section 27(1) to situations in which SP II has a security interest in an account or chattel paper created by the sale or lease of the returned or repossessed goods. The operation of this section is illustrated in the following scenario. SP II takes a security interest in (or buys - see section 3(b)) chattel paper (section 1(1)(c)) generated by the sale of D's inventory of automobiles. SP II's expectations are that he will obtain payment directly from B, the buyer of one of D's automobiles. However, if the automobile sold to B is returned to D or is repossessed by him, SP II's expectations may be frustrated in that he may not have the legal right or practical facility to collect from B. Accordingly, his attention will focus on the automobile returned to or repossessed by D. As purchaser of the chattel paper, SP II does not have title to the automobile, he has a security interest in the chattel paper which is no longer of much commercial value. The effect of section 27(3) is to give to him a security interest in the returned or repossessed automobile. An assignee of an account resulting from the sale by D to B, hereafter referred to as SP III, is given a position parallel to that of SP II.

4. Section 27(4) addresses the problem resulting from the fact that SP II and SP III started with a security interest in chattel paper and an account respectively, but are given a security interest in a very different type of collateral, an automobile. The effect of the section is to give to SP II and SP III a 15 day period of temporary perfection during which they must take the necessary steps to perfect their security interests in the automobile. Failure to do so may result in automatic loss of perfection at the end of the period. Note that as against any good faith buyer of the automobile who gives value and takes possession of it, SP II's and SP III's security interests are not perfected during the 15 day period.

5. Section 27(6) states the applicable rule where priority conflicts between SP I, SP II and SP III arise. As between SP I, the inventory financer, and SP II, the chattel paper financer, SP II gets priority if he qualifies under the rule specified in section 29(5). As between SP II and SP III, the transferee of the account, and as between SP I and SP III, priority will depend upon which has registered or otherwise perfected his security interest in the original collateral first.

Buyer or lessee in the ordinary course of business takes free of security interest

28(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 27, notwithstanding that the buyer or lessee knew of it, unless the buyer or lessee also knew that the sale or lease constituted a breach of the security agreement.

(2) A buyer or lessee of goods bought or leased primarily for personal, family, household or farming uses takes free of a perfected security interest in the goods if

(a) he gives new value for his interest,

(b) he bought or leased the goods without notice of the security interest, and

(c) he receives delivery of the goods.

(3) Subsection (2) does not apply to a security interest in

(a) a motor vehicle as defined in the regulations,

(b) fixtures, or

(c) goods whose purchase price exceeds $750 or, in the case of a lease, whose retail market value exceeds $750.

(4) Where serial numbered goods are sold or leased other than in the ordinary course of business of the seller or lessor and the goods were equipment of the seller or lessor, the buyer or lessee takes free from any security interest in the goods given by the seller or lessor and perfected under section 23 if

(a) the buyer or lessee did not know that the goods were subject to the security interest, and

(b) the goods were not described by serial number in the financing statement.

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under section 24(2), 26(3) or 27(4) or a security interest the perfection of which is continued under section 55(1) or (2) during any of the 15-day periods mentioned in those subsections, if

(a) he gives new value for his interest,

(b) he buys or leases the goods without notice of the security interest, and

(c) he receives delivery of the goods.

(6) A sale or lease under subsections (1), (2), (4) and (5) may be

(a) for cash,

(b) by exchange for other property, or

(c) on credit,

and includes delivering goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a monetary obligation.

COMMENT:

1. On the surface section 28(1) appears to supplement section 26(1)(a) by implying a power of sale or disposition in all security agreements providing for a security interest in inventory. However, this section goes much further. It provides absolute protection to the ordinary course buyer or lessee, whatever the terms of the security agreement between the seller and the secured party. Further, mere knowledge of the existence of such a security agreement by the buyer or lessee does not affect the protection given to him unless he is aware that the sale or lease, as the case may be, is made in violation of the security agreement.

2. The ordinary course buyer or lessee is not given complete protection since section 28(1) provides that he "takes free" of any security interests in the goods "given by the seller or lessor or arising under section 27". If the security interest with which the buyer's or lessee's interest is in competition is not one given by the seller or lessor or one arising under section 27, the buyer or lessee must look elsewhere for protection which may or may not be available depending upon the circumstances of the particular case. The operation of section 28(1) is illustrated in the following scenario. SP I takes a security interest in D's automobile and registers the appropriate financing statement. SP II takes a security interest in the inventory of automobiles owned by S, a retail automobile dealer. This security interest is perfected. D sells his automobile to S who in turn sells it to B. Both SP I and SP II assert their security interests in the automobile in B's hands. Section 28(1) protects B against the claim of SP II but not against the claim of SP I. SP II's security interest was one given by S the seller to B. SP II's interest was not given by S, but was given by D.

3. The priority dispute between SP I and B raises some major policy difficulties. If SP I takes a security interest in property owned by D and perfects his interest by registration using D's name as the registration criterion, and D then proposes to sell the property to S, S will be able to discover the existence of SP I's interest through a registry search using D's name as the search criterion. However, if D sells the property to S, who then offers it for sale to B, the registration of SP I's interest will not be disclosed to B when he obtains a search result from the registry using S's name as the search criterion. The reason for this is that the only search criterion B has available (assuming that he is unaware of the fact that S bought the property from D) is S's name. The result is that SP I has a registered security interest in the property which will not be disclosed on a search by B. There are no simple solutions to this problem. Given the supreme importance the common law places on proprietary interests, it would be unacceptable to adopt a general rule that SP I's interest is subordinated to B merely because B acquired the property in good faith, for value and without actual notice of SP I's interest. On the other hand, if SP I prevails, the efficacy of the registry system can be called into question on the grounds that in this context it does not fulfill its goal, which is to provide public access to information concerning security interests in property held by persons not in possession of the property.

4. Bill 73 adopts measures to reduce the problem. One measure is contained in section 28(2). Under this section, buyers or lessees of "small ticket" consumer goods take free of any perfected security interest in the goods if they give new value, buy or lease without notice of any prior security interest, and take delivery of the goods. Protection afforded by section 28(2) is, however, limited by section 28(3) to goods other than motor vehicles, and goods of a value of $750 or less. Accordingly, section 28(2) would be of no help to B in the scenario set out above.

5. Another measure which Bill 73 employs to assist B is the requirement that under prescribed circumstances security interests in certain types of goods be registered by serial number as well as by debtor name. These circumstances and the types of goods involved will be prescribed by regulation. See section 77(t). It is most likely that goods such as motor vehicles, when held as consumer goods or equipment, will fall within a category of "serial numbered goods". See section 1(1)(w). However, when motor vehicles are held as inventory, no serial number registration is likely to be required. In the scenario set out above, B would be able to avoid loss by a search of the registry using the serial number of the automobile which he purchases from S. If SP I properly registered his financing statement, his security interest would be disclosed to B.

6. It should be noted that there are situations in which B is not protected by the system contemplated by Bill 73. If the goods involved fall within the excluded list prescribed by section 28(3) and are not "serial numbered goods", B does not take free from SP I's security interest nor can he rely on a search of the registry to disclose that interest.

7. The most obvious method of reducing D's exposure to risk is to expand as much as is feasible the types of goods included in the category of serial numbered goods. However, not all types of goods have reliable serial numbers. Further, a requirement that serial numbers be included on financing statements increases the burden of compliance on the part of registering parties. This burden is particularly onerous where many items of collateral are involved and where old items are constantly being disposed of and new ones acquired. For example, if motor vehicles held as equipment are included in the class of serial numbered goods, a bank which has provided broadly based, long term financing on all of the assets of a corporate debtor must obtain and include on financing statements and financing change statements the serial numbers of all motor vehicles acquired by the debtor. This may be an expensive and difficult task.

Section 28(4) provides some relief in the situation described in the preceding paragraph. The section must be read as functioning in conjuncton with regulations which provide that security interests in certain types of serial numbered goods are perfected without registration of the serial number. Section 28(4) states an exception to this rule. Failure to include the serial number results in subordination of the security interests to a buyer or lessee under the circumstances described in section 28(4) but does not affect the status of the security interest vis-a-vis other parties such as secured parties, unsecured parties or the trustee in bankruptcy. Accordingly, if the secured party wants full protection, he will register a financing statement using the debtor's name and the equipment serial number. If he has little concern about an unauthorized disposition by his debtor, he will not go to the expense and trouble involved in obtaining and including serial numbers in his registration.

8. Section 28(5) enables buyers or lessees of goods to rely on search results obtained from the registry without having to be concerned that a security interest may exist which is temporarily perfected without registration or possession of the collateral by the secured party. The perfected status afforded by sections 24(2), 26(3), 27(4), 55(1) and 55(2) can be asserted against all other interests, but not as against a buyer or lessee in the circumstances described in the section. See also section 5(2).

Priority of holder of money

29(1) A holder of money has priority over any security interest in it perfected under section 23 or temporarily perfected under section 26(3) if the holder

(a) acquired the money without notice that it was subject to a security interest, or

(b) was a holder for value, whether or not he acquired the money without notice that it was subject to a security interest.

(2) Notwithstanding subsections (1) and (3), a creditor who receives money or an instrument drawn or made by a debtor and delivered in payment of a debt owing to him by that debtor takes free from a security interest in the money or instrument drawn or made by the debtor whether or not the creditor has notice of the security interest.

(3) A purchaser of an instrument or a security has priority over any security interest in the instrument or security perfected under section 23 or 76 or temporarily perfected under section 24 or section 26(3) if the purchaser

(a) gave value for his interest,

(b) acquired the instrument or security without notice that it was subject to a security interest, and

(c) took possession of the instrument or security.

(4) A holder to whom a negotiable document of title has been negotiated has priority over any interest in the negotiable document of title that is perfected under section 23 or temporarily perfected under section 24 or 26(3) if the holder

(a) gave value for the document of title, and

(b) took the negotiable document of title without notice that it was subject to a security interest.

(5) A purchaser of chattel paper who took possession of it in the ordinary course of business and who gave new value for it has priority over

(a) any security interest that, in the case of chattel paper claimed as original collateral, was perfected under section 23 or any security interest in it as proceeds of equipment or consumer goods, if the purchaser acquired the chattel paper without notice that it was subject to a security interest, and

(b) any security interest in it as proceeds of inventory, whether or not the purchaser has notice of the security interest.

COMMENT:

1. A security interest can be taken in money either as original collateral or as proceeds. Such an interest can be perfected by registration under section 23 or temporarily perfected under section 26(3). Section 29(1) is designed to ensure that such a security interest cannot be the basis for a claim against a holder of the money who acquired it without notice of the security interest or a holder for value of the money with or without notice of the security interest.

2. Section 29(2) is designed to give a debtor power to meet the claims of other creditors where he has given a security interest in property which he must have in order to pay those creditors. This power is equivalent to that which a debtor has under an uncrystallized floating charge. As a result of section 29(2), a secured party with a perfected security interest in money or instruments of the debtor has no right to such money or instruments in the hands of a creditor who obtained it by voluntary transfer by the debtor, even though the recipient of the money or instrument had knowledge of the security interest when he acquired it.

3. Sections 29(3) and (4) are designed to protect interests in instruments, securities and negotiable documents of title acquired through negotiation. Under section 23, a security interest in negotiable collateral can be perfected by registration. Sections 29(3) and (4) nullify the effect of such perfection as well as temporary perfection under sections 24 and 26(3) in cases where it is asserted against a holder of the negotiable collateral who acquired his interests for value and without notice of the security interest.

4. Section 29(5) provides a special priority rule for interests in chattel paper. See section 1(c). Chattel paper, while composed of two elements, an obligation and a security interest in specific goods, is treated in the Bill as a type of collateral subject to special priority rules. A security interest in chattel paper is in effect a security interest in a security interest and an obligation. It may also be a security interest in the interest of a lessor under a lease of chattels. See section 1(1)(c). Complete protection of the holder of a security interest in chattel paper may require double perfection: perfection of the underlying security interest and perfection of the security interest in the chattel paper. This is illustrated in the following scenario. A sells an automobile to B under a secured instalment sales contract. A has a security interest which must be perfected to be protected against buyers, other secured parties and unsecured parties dealing with B, and as against B's trustee in bankruptcy. A then sells the chattel paper to C who must perfect his security interest in the chattel paper in order to protect it against buyers, other secured parties and unsecured parties dealing with A and as against A's trustee in bankruptcy. The perfection of C's security interest in the chattel paper does not perfect the security interest in the automobile. If B sells the automobile to D when the security interest in it is unperfected, C is left with nothing except the obligation of B, which is likely to be valueless, and any recourse he may have against A.

5. A security interest in chattel paper includes the interest of a buyer of the paper. See sections 1(1)(p.1), 1(1)(v) and 3(b).

6. Section 29(5) treats chattel paper as having quasi-negotiable characteristics. A security interest in chattel paper can be perfected by registration or by possession. However, if it is perfected by registration, it is subject to being defeated by a purchaser of the chattel paper who gives value and

takes possession of it. As to the definition of purchaser see section 1(1)(p.1). The operation of section 29(5) is illustrated in the following scenarios: SP I takes a security interest in chattel paper generated by the sale of inventory held by D. SP I's security interest is perfected by registration. D sells an item of inventory to B under a secured instalment sales contract and sells the contract (chattel paper) to SP II who takes possession of it. Under section 29(5)(a) SP II is given priority if he gives new value and acquires the chattel paper without notice of SP I's security interest. SP I's registration of his security interest is not sufficient; SP II must have actual notice of SP I's interest. See sections 43 and 71. It is clear that under section 29(5) possession as a method of perfecting an interest in chattel paper is superior to registration. This parallels the priority rules set out in sections 29(3) and (4). SP I can protect his interest in chattel paper left in D's possession by stamping on each contract a notice of SP I's interest in it.

In a second scenario, SP I takes a security interest in D's inventory of automobiles and proceeds including chattel paper. SP I's security interest is perfected by registration. D sells an automobile to B under a secured instalment sales contract and sells the contract (chattel paper) to SP II. Under section 29(5)(b) SP II has priority so long as he gives new value and takes possession of the chattel paper. He need not be without notice of SP I's security interest since the chattel paper is proceeds of inventory. The decision to give a superior status to SP II even though he has knowledge of a prior interest in the chattel paper is based on the conclusion that the free negotiation of chattel paper generated by the sale of inventory is to be encouraged. The ability of D to dispose of his chattel paper under these circumstances provides new sources of cash flow for him.

Assume facts identical to those in the scenario set out in the immediately preceding paragraph with the exception that the chattel paper is generated from the sale of equipment or consumer goods. Note that the rule of section 29(5)(a) not that of section 29(5)(b) applies.

Priority of liens

30 Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has in respect of those materials or services has priority over a perfected security interest unless an Act in force in the Province provides that the lien does not have priority.

COMMENT:

This section is an exception to the general rule stated in section 4(a) that the Bill does not deal with liens arising by operation of law. This section states a priority rule for situations where security interests come into conflict with artisans' and repairers' liens. The priority rule does not displace priority rules contained in specific legislation such as the Garagemen's Lien Act R.S.A. 1980, c. C-21, s. 5.

Alienation of rights of debtor

31 The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer does not prejudice the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

COMMENT:

Since the creation of a security interest does not involve a transfer of title or ownership to the secured party, the debtor remains the owner of the collateral. See section 3. Section 31 recognizes a debtor's power to dispose of his interest in the collateral and the right of others, such as judgment creditors, to have the debtor's interest seized under judgment enforcement proceedings. While a secured party cannot prevent voluntary or involuntary transfer of the debtor's interest in the collateral, a clause in the security agreement which provides that such a transfer amounts to default under the agreement is valid.

Priority of purchase money security interests

32(1) A purchase money security interest in inventory or, subject to section 26, its proceeds, has priority over a security interest in the same collateral given by the same debtor, if

(a) the purchase money security interest in the inventory was perfected at the time

(i) the debtor received possession of it, or

(ii) a third party at the request of the debtor received possession of it,

whichever is the earlier,

(b) the purchase money secured party gives notice in writing to any other secured party who has registered a financing statement covering the same type of inventory before the date of registration by the purchase money secured party,

(c) the other secured party received the notice mentioned in clause (b) not later than 2 years before the debtor, or third party at the request of the debtor, received possession of the inventory, and

(d) the notice mentioned in clause (b) states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing the inventory by type or kind.

(2) A purchase money security interest in collateral or, subject to section 26, its proceeds, other than a purchase money security interest in inventory, held by a seller, lessor or consignor of the collateral and which

(a) in the case of collateral other than an intangible, is perfected not later than 15 days after the day

(i) the debtor received possession of the collateral, or

(ii) a third party at the request of the debtor received possession of the collateral,

whichever is the earlier, or

(b) in the case of an intangible, is perfected not later than 15 days after the day the security interest in the intangible attaches,

has priority over any other purchase money security interest in the same collateral.

(3) A non-proceeds purchase money security interest has priority over a purchase money security interest in proceeds under subsections (1) and (2) in the same collateral if the non-proceeds purchase money security interest is perfected at the time the debtor, or a third party at the request of the debtor, obtains possession of the collateral or not later than 15 days thereafter.

(4) A perfected security interest in crops or their proceeds given for value to enable the debtor to produce the crops during the production season and given not later than 6 months before the crops become growing crops by planting or otherwise has priority over an earlier perfected security interest to the extent that the earlier interest secures obligations that were contracted more than 6 months before the crops become growing crops by planting or otherwise, notwithstanding that the person giving the value knew of the earlier security interest.

(5) Where there is more than 1 perfected security interest given priority by subsection (4), each shall rank equally according to the ratio that the amount advanced by each bears to the total amount advanced.

(32(1.1) A purchase money security interest in collateral or, subject to section 26 its proceeds, other than a purchase money security interest in inventory, has priority over any other security interest in the same collateral given by the same debtor, if

(a) in the case of collateral other than an intangible, it is perfected not later than 15 days after the day

(i) the debtor receives possession of the collateral, or

(ii) a third party at the request of the debtor receives possession of the collateral, whichever is the earlier, or

(b) in the case of an intangible, it is perfected not later than 15 days after the day the security interest in the intangible attaches.)

(This section was inadvertantly omitted from Bill 73. It is included here for purposes of completeness of discussion of purchase money security interests.)

COMMENT:

1. The general priority rule applicable to conflicts among security interests in the same collateral is prescribed in section 33. Under this rule, the secured party who has first registered a financing statement, taken possession of the collateral or has obtained temporary perfection of his security interest gets first priority. Sections 32(1) and 32(1.1) state exceptions to the first in time rule. Under the circumstances prescribed in these sections, a secured party who has a purchase money security interest (see section 1(1)(q)) is given priority over a secured party who has registered a financing statement or who has obtained temporary perfection for his security interest before the purchase money security interest was perfected. The special priority given to a purchase money security interest is often described as a super priority.

There is both social and commercial justification for this super priority given to purchase money security interests. The Bill adopts the principle that a financer who provides money or credit for the purposes of enabling a debtor to acquire new collateral should be given a special priority status over other secured parties claiming an interest in the newly acquired collateral and its proceeds. Under the Bill, parties are free to enter into financing arrangements under which all of the debtor's present and future assets are encumbered. Unless exceptions are permitted, a debtor who has little bargaining power may be forced into a situation which he is unable to obtain further secured financing to acquire needed goods. The purchase money priority provides relief for him. Under existing Alberta law, the same result is reached through the use of conditional sales contracts to finance the acquisition of new property. The Bill extends this to situations where money is loaned to the debtor to acquire the goods and the security interest is taken in those goods by the lender.

The purchase money priority should not significantly prejudice prior secured parties. A purchase money security interest will cover only newly acquired collateral and proceeds. A prior non-purchase money financer knows in advance that his security interest is unlikely to have priority over an interest in such collateral.

2. Section 32(1) specifies the circumstances under which the holder of a purchase money security interest in inventory (section 1(1)(k.1)) can acquire priority over prior security interests in the same collateral given by the debtor. The purchase money security interest must be perfected at the time the debtor or his appointee obtains possession of the collateral. The holder of the purchase money security interest also must have given prior notice to other holders of registered security interests in the same type of collateral of his intention to supply financing to the debtor secured by purchase money security interests. The reason for the requirement that a notice be given to prior secured parties is to prevent them from being deceived into thinking that the new collateral acquired by the debtor under the purchase money financing arrangement is unencumbered and is available as security for further advances to the debtor. The operation of section 32(1) is displayed in the following scenario. SP I enters into an agreement with D under which SP I is given a security interest in all of D's present and after-acquired personal property in return for a line of credit to be advanced over a period of time. D enters into an agreement with SP II, a bank, to obtain a loan to purchase new inventory (or enters into an agreement with SP II, a supplier of the inventory willing to provide the inventory on a secured credit basis.) The agreement with SP II provides for a security interest in the inventory. If SP II registers a security interest and gives SP I the prescribed notice before D obtains delivery of the new inventory, his security interest in it has priorty over SP I's security interest which automatically attached to the inventory and was perfected when D got rights in it. The notice warns SP I that he should not make advances under the line of credit on the assumption that the new credit will be secured by the newly acquired inventory. The notice which SP II must send to SP I is general in nature and can be given at any time during a period of 2 years prior to D obtaining possession of the inventory. Failure to give the notice as required prevents SP II from having the super priority afforded to purchase money security interests and result in him having a second priority to SP I.

3. Section 32(1.1) specifies the requirements which must be met by a secured party, with a purchase money security interest in collateral other than inventory, claiming the purchase money super priority. Note that these requirements are less demanding than those of section 32(1). No prior notice is required and a "grace period" after delivery of possession of the goods or attachment of the security interest in intangibles is allowed. However, this grace period is not available to the secured party if the competing interest is that of a buyer and not another secured party or unsecured party. See section 21.

4. The super priority given by sections 32(1) and 32(1.1) to purchase money security interest in original collateral extends also to proceeds. The operation of section 32(1) in this context is illustrated in the following scenario. SP I takes and registers a non-purchase money security interest in all of D's present and after-acquired inventory of electrical appliances and proceeds, including accounts. D obtains a loan from SP II, a bank, in order to purchase some appliances. SP II takes a security interest in the appliances and complies with the requirements of section 32(1). D sells some of the appliances on unsecured credit. Both SP I and SP II claim the resulting accounts as proceeds of the security interests. Under section 32(1) priority is given to SP II so long as he has met the requirements of section 32(1) and section 26.

5. Note that while in order for a lender to have a purchase money security interest the security agreement need not specify that a purchase money security interest is involved, it is necessary that the loan be made "for the purposes of enabling the debtor" to acquire the collateral. Further, the secured party must be able to prove that the money was in fact used by the debtor for that purpose. See section 1(1)(q).

6. Section 32(2) provides a priority rule in a situation where a vendor purchase money security interest and a lender purchase money security interest are taken in the same collateral. The operation of the section is illustrated in the following scenario. SP I loans money to D to provide the downpayment or the purchase of an automobile. SP I registers a financing statement. D takes the downpayment and purchases the automobile from SP II who takes a security interest in it to secure the balance of the purchase price and registers a financing statement. Both SP I and SP II have purchase money security interests. See section 1(1)(q). Under section 32(2) priority is given to SP II because he is a seller of the collateral. The same result would be reached under current Alberta law if SP II sells under a conditional sales contract. If both SP I and SP II provide loans used to purchase the automobile, section 32(2) would be inapplicable and section 33(1) would give priority to SP I.

7. Section 32(3) is designed to deal with the following situation. SP I sells a cash register to D on credit taking and perfecting a purchase money security interest in the cash register. Some time, later D purchases a new cash register from SP II on credit and trades in the old cash register. SP II takes and perfects a purchase money security interest in the new cash register. D defaults under both security agreements. SP I claims the new cash register as proceeds of its original collateral, the old cash register. SP II claims the new cash register as original collateral. Apart from section 32(3), SP I would have priority since his financing statement was registered first. See section 33(1). Section 32(3) reverses this result giving priority to SP II since he supplied the new cash register. SP I has his remedy against the old cash register.

8. Sections 32(4) and 32(5) give a special priority to crop financers. This can be an important factor when a farmer seeks short term credit for the acquisition of fuel, seed and fertilizer. This section should be read along with section 12(3)(a).

Priority of perfected security interests in the same collateral

33(1) If no other provision of this Act is applicable,

(a) priority between perfected security interests in the same collateral shall be determined by

(i) registration,

(ii) possession of the collateral under section 22, or

(iii) perfection under section 5, 7, 24 or 76,

whichever is the earliest,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between unperfected security interests shall be by the order of attachment.

(2) For the purposes of subsection (1), a continuously perfected security interest

(a) shall be treated at all times as if perfected by registration, if it was originally so perfected, and

(b) shall be treated at all times as if perfected otherwise than by registration, if it was originally perfected otherwise than by registration.

(3) If future advances are made at a time during which a security interest is perfected, the security interest has the same priority for the purposes of this section with respect to the future advances as it has with respect to the first advance.

(4) A perfected security interest has priority over the interests of persons mentioned in section 19(1)(a) only to the extent of

(a) advances made before the interests of those persons arise or made before the sheriff seizes the collateral or obtains a right to it,

(b) advances made before the secured party receives notice of the interests of those persons or before notice of seizure by a sheriff or an order giving to the sheriff rights to the collateral, and

(c) reasonable costs incurred and expenditures made by the secured party for the protection, maintenance, preservation or repair of the collateral.

(5) For the purposes of subsection (1), a date of registration, possession or perfection as to collateral is also the date of registration, possession or perfection as to its proceeds.

(6) Where the registration of a security interest lapses as a result of the secured party's failure to renew the registration or where the registration of a security interest has been discharged fraudulently, in error or without authorization, the secured party may re-register his security interest not later than 30 days after the lapse or discharge, and where he re-registers, the prior lapse or discharge does not affect the priority status of the security interest in relation to competing interests in the collateral which arose prior to the lapse or discharge, except insofar as subsequent advances are made or contracted for following the lapse or discharge and prior to the re-registration.

COMMENT:

1. This section states the residual priority rule applicable where no special priority rule can be applied to a priority dispute. Sections 33(1), 33(2) and 33(5) describe a simple first in time, first in right priority rule. The secured party who first registers, takes possession of the collateral or obtains temporary perfection gets priority. The security interest is given priority even though it is not the first to be perfected so long as a financing statement relating to it was registered first. Under section 48, a financing statement can be registered before a security agreement is executed and before a security interest attaches.

2. Note that priority can be gained under section 33(1) even though the secured party claiming that priority has notice of a prior security interest which for some reason does not qualify for first priority. Section 65 requires that all rights are to be exercised in good faith. However, it is unlikely that the courts will conclude that proceeding, with the knowledge of a prior interest, amounts to bad faith.

The operation of sections 33(1) and 33(2) is illustrated by the following scenarios:

(a) SP I registers a financing statement naming D as debtor and describing the collateral as automobiles. SP II enters into a security agreement with D providing for a non-purchase money security interest in automobiles owned by D. SP II registers a financing statement relating to the security agreement and advances the money to D. Later SP I enters into a security agreement with D involving automobiles as collateral and advances money to him. SP I has priority even though SP II's advance was made earlier and his security interest was perfected first. It makes no difference that SP I knew of SP II's interest when he entered into the agreement with D and made his advance.

(b) SP I enters into a security agreement with D and takes possession of the collateral. SP II enters into a security agreement with D and makes a non-purchase money advance against the same collateral and perfects his security interest by registration. SP I has priority even though he never registered his interest. He perfected first by possession.

(c) SP I enters into an agreement which provides for advances against an order bill of lading. SP I takes possession of the bill of lading and advances the money. SP I then releases the bill of lading to D who surrenders it to the carrier and obtains possession of the goods it represents. Five days after D gets possession of the goods, SP II enters into a security agreement with D and makes advances against the goods and perfects his interest by registration. On the sixth day after release of the bill of lading to D, SP I registers his security interest in the goods. SP I has priority over SP II. Since SP I's interest was first perfected when he took possession of the bill of lading, it remained temporarily perfected for 15 days after release of the bill to D (section 24(2)(b)) and its perfection was perpetuated through registration as to the goods before the expiration of the 15 day period. See section 21.

(d) SP I acquires a security interest in D's inventory of appliances and proceeds, including accounts. He registers the appropriate financing statement. SP II acquires a security interest in D's accounts and registers the appropriate financing statement. D sells some appliances on unsecured credit thereby creating accounts. D defaults under both security agreements. Both SP I and SP II claim priority to the accounts. SP I has priority because he registered first as the appliances and proceeds and under section 33(5) that registration gives him priority with respect to the accounts as proceeds. Section 33(5) is designed to complement section 26. This section ensures that the priority position of the security interest in the proceeds has the same status as the security interest in the original collateral. The section applies only where the registration as to the original collateral is effective as to proceeds or where the security interest in the proceeds is otherwise perfected in accordance with section 26.

3. Section 33(3) states the priority rule which recognizes tacking of future advances. See also section 13. The operation of the section is illustrated in the following scenario. SP I takes and registers a security interest in collateral which has a value of $10,000; but he makes an advance in the amount of $5,000. The security agreement provides for a line of credit. SP II takes and registers a security interest in the same collateral and makes an advance of $5,000. SP I makes a further advance to the debtor of $3,000. Later, after discovering the existence of SP II's interest in the collateral SP I makes an additional advance of $2,000. SP I has priority over SP II to the full extent of his advances: $10,000. The priority rule of this section is merely a refinement of the basic priority system of section 33(1). In this scenario, SP I would have priority whether or not he made the intitial $5,000 advance or indeed, whether or not he entered into a security agreement with D before SP II took a security interest in the collateral. The reason for this is that SP I registered his financing statement first.

4. The priority rules of sections 33(1) and 33(3) apply only where the competition is between security interests. Section 33(4) states a different rule where the competition is between a secured party and an unsecured party who, to the knowledge of the secured party, has had the collateral seized, attached or otherwise made subject to some judgment enforcement proceeding. The operation of this section is illustrated in the following scenario. SP I takes and registers a security interest in collateral which has a value of $10,000 under a security agreement which provides for an immediate advance of $5,000 and future advances up to an additional $5,000. The initial $5,000

is advanced to D. Immediately thereafter the collateral is seized by a sheriff under a writ of execution issued by C, an unsecured party, against D. In ignorance of this fact, SP I advances an additional $3,000 to D. After being informed of the seizure, SP I makes an additional advance of $2,000 to D. SP I has priority to the extent of $8,000 in the collateral. C's claim must be satisfied before SP I's interest created by the final $2,000 advance is recognized. It is clear that the priority rule of section 33(4) involves a policy decision opposite to that contained in section 33(3). In other words, where the intervening interest is that of an unsecured party who has caused the collateral to be seized under a judgment enforcement measure, future advances made by a financer with a prior perfected security interest cannot be tacked if the financer is aware of the intervening unsecured party's interest. The reason for the difference between the two rules relates to the difference in the position of an unsecured party and that of an intervening secured party. A financer who is approached by a debtor is able to protect himself against subordination to a secured party with the prior perfected security interest simply by refusing to advance credit to the debtor unless the prior secured party executes a subordination agreement. An unsecured party is not often in this position. He may well have given credit to the debtor long before any of the debtor's assets were encumbered. Indeed, he may well be a tort creditor who has no choice as to whether or not to deal with the debtor. Unlike the financer described above, he cannot avoid loss simply by refusing to deal with the debtor. A person who is in the position to avoid loss is the secured party who has the prior perfected security interest. He should not be able to ignore the position of the unsecured party and make new advances to the debtor in the full realization that in doing so he is jeopardizing the unsecured party's opportunity to enforce his claim. Of course, he still has priority with respect to advances made before the interest to the unsecured party arises and with respect to advances which represent costs incurred in protecting, maintaining, preserving or repairing the collateral.

5. Section 33(6) is designed to ameliorate the arbitrariness of section 33(1) in situations where registration lapses or is fraudulently or inadvertently discharged. Since variable registration is permitted by the Bill under section 51(1), there should be very few cases where lapse of registration will occur. Fraudulent discharge of a registration is the primary focus of the section. The operation of the section in this context is illustrated by the following scenario. SP I takes a security interest in collateral and registers a financing statement with a 10 year registration life. SP II takes a security interest in the same collateral and registers a financing statement with a 10 year registration life. Six months later, SP I's security interest is fraudulently or inadvertently discharged. Thereafter, SP III takes a security interest in the same collateral and registers a financing statement with a 10 year registration life. In the absence of section 33(6), SP II would be promoted over SP I by the discharge of his registration. However, section 33(6) permits SP I to maintain his first priority status in relation to "competing interests in the collateral which arose prior to the discharge" by re-registering, with the result that SP I maintains priority over SP II. However, it is clear that section 33(6) does not permit SP I to gain priority over SP III or over SP II to the extent that SP II has made or contracted for advances after the discharge and before re-registration of SP I's financing statement. The basic policy underlying section 33(6) is that SP II has not suffered prejudice from the discharge of SP I's registraton. To give him priority is to give him an unexpected windfall.

However, section 33(6) has within it the potential for circular priorities. In the scenario set out above, as between SP I and SP II, SP I has priority; as between SP I and SP III, SP III has priority; but as between SP II and SP III, SP II has priority. The result is that SP I has priority over SP II, SP II has priority over SP III, but SP III has priority over SP I. The Act does not provide a method to break the circular priority. Resort to the common law will be necessary. The assumption underlying section 33(6) is that the frequency with which circular priority problems will arise and the difficulty in dealing with them is not such that the apparent injustice of giving SP II an unexpected windfall must be accepted as a necessary feature of the priority system.

Fixtures

34(1) This section does not apply to building materials.

(2) Subject to subsection (3),

(a) a security interest in goods that attached before they became fixtures has priority with respect to the goods over the claim of any person who has an interest in the real property, and

(b) a security interest in goods that attached after they became fixtures has priority over the claim of any person who subsequently acquired an interest in the real property, but not over any person

(i) who had a registered interest in the real property at the time the security interest in the goods attached, and

(ii) who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

(3) A security interest mentioned in subsection (2)

(a) is subordinate to the interest of

(i) a creditor with a prior registered encumbrance on the real property with respect to subsequent advances made by the creditor, and

(ii) a subsequent purchaser for value of an interest in the real property,

if the subsequent advances under the prior registered encumbrance or the subsequent purchase is made or contracted for after the goods are affixed, without fraud and before the security interest is registered in accordance with section 49, and

(b) is subordinate to the interest of a creditor of the debtor who

(i) has acquired through legal process a lien or charge against the real property to enforce a judgment, or

(ii) has caused to be transmitted to the Registrar of Land Titles a writ of execution if the lien or charge arises or the writ is transmitted before the security interest is registered in accordance with section 49.

(4) No lien or charge mentioned in subsection (3)(b) takes priority over a purchase money security interest in the goods notice of which is registered in accordance with section 49 not later than 15 days after the day the debtor, or a third party at the request of the debtor, obtains possession of the goods.

(5) A secured party who, under this Act, has the right to remove goods from real property shall exercise his right of removal in a manner that causes no greater damage or injury to the land or to the other property situated thereon, or that puts the owner, lessee or occupier of the land to no greater inconvenience, than is necessarily incidental to the work of removing the goods.

(6) A person, other than the debtor, who has an interest in real property at the time goods subject to a security interest are affixed to the real property is entitled to reimbursement for any damage to his interest in the real property resulting from the removal of the goods, but is not entitled to reimbursement for diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement.

(7) Persons entitled to reimbursement as provided in subsection (6) may refuse permission to remove the goods until the secured party has given adequate security for the reimbursement.

(8) The secured party may apply to a court for any one or more of the following orders:

(a) determining the persons entitled to reimbursement under this section;

(b) determining the amount and kind of security to be provided by the secured party;

(c) prescribing the depository for the security;

(d) dispensing with the consent of any or all of the persons mentioned in clause (a).

(9) A person having an interest in real property that is subordinate to a security interest by virtue of subsection (1) may, before the goods have been removed from the real property by the secured party, retain the goods on payment to the secured party of the amount secured by the security interest having priority over his interest.

(10) The secured party who has the right to remove goods from real property shall serve, on each person who appears by the records of the land titles office to have an interest in the land, a notice in writing of his intention to remove the goods, which shall contain

(a) the name and address of the secured party,

(b) a description of the goods to be removed sufficient to enable them to be identified,

(c) the amount required to satisfy the obligation secured by his security interest,

(d) a description of the land to which the goods are affixed, and

(e) a statement of intention to remove the goods unless the amount secured is paid on or before a specified day that is not less than 12 days after service of the notice in accordance with subsection (11).

(11) A notice mentioned in subsection (10) shall be served at least 15 days before removal of the goods and may be served in accordance with section 70 or by registered mail addressed to the address of the person to be served as it appears in the records of the land titles office.

(12) Any person entitled to receive a notice under subsection (10) may apply to a judge for an order postponing removal of the goods from the real property, and the judge may make any order that he considers just and reasonable.

COMMENT:

1. This section has two primary purposes:

(a) to reverse the common law principle that chattels affixed to realty lose their separate identity as personal property and become part of the realty to which they are affixed;

(b) to provide a system through which persons acquiring interests in realty can be forewarned of the existence of a chattel security interest in goods affixed to the realty they are acquiring.

2. The Bill does not contain a definition of the term "fixture"; the common law must supply this. However, some guidance on the matter is found in the definition of "building materials" contained in section 1(1)(b.1). This definition states what is not to be treated as a fixture for the purposes of section 34. In other words, where building materials are involved a security interest in them cannot be maintained as a personal property interest under the scheme of section 34.

3. Section 34(2)(a) deals with security interests in goods that attach before the goods become fixtures. In such a case, the security interest continues to be recognized as a personal property interest in the goods notwithstanding that the goods have lost their separate identity as personal property for other purposes.

The priority structure of section 34 as it applies to such security interests is quite complex. Section 34(2)(a) is stated to be subject to subsection (3) which provides priority rules. Failure on the part of the secured party to register a notice in the appropriate Land Titles Office results in the security interest in the goods being subordinated to specified competing interests. It should be noted, however, that subsection (3) mentions only three types of interests:

- a creditor with a prior registered encumbrance on the real property who makes or contracts for subsequent advances after the goods are affixed,
- a subsequent purchaser for value of an interest in the real property and
- an execution creditor who has obtained a lien or charge against the land.

Absent from the list are owners of the real property who acquire ownership before the goods are affixed, prior encumbrancers who do not make or contract for advances after the goods are afixed and other secured parties who have security interests in the goods. With respect to the latter, perfection and priority aspects are regulated by rules applicable to conflicting security interests in the goods themselves. The fact that the collateral becomes a fixture is of no significance in that context.

The operation of sections 34(2)(a) and 34(3) is illustrated in the following scenario:

SP sells a large air conditioner to D under a secured instalment sales contract. The machine is installed in business premises owned by A and held by D under a long term lease. The lease is mortgaged to Bank X and the mortgage is registered. Assume that SP fails to register his security interest as required by sections 34 and 49. The machine is affixed to the business premises in such a manner as to make it in law a fixture. After the machine is affixed, Bank X loans additional funds to D under its mortgage. A mortgages his interest in the real property to Bank Z. C, an unsecured party of D, obtains a judgment against D and issues a writ of execution with the result that D's interest in the lease is seized by the sheriff. D also defaults under his security agreement and SP seeks to realize on his security interest by seizure and removal of the machine. A, Bank X, Bank Z and C object, each claiming priority over SP. A's claim is groundless since he is not a subsequent purchaser. But Bank Z is a subsequent purchaser and has priority over SP. See section 1(1)(p.1). Bank X, although a prior mortgagee, made advances subsequent to the goods being affixed; accordingly, its claim has priority over SP under section 34(3)(c). C, the subsequent unsecured party, takes priority over SP as a result of section 34(3)(b). Of course, the respective priority positions of Bank X, Bank Z, and C is determined under real property and executions law.

4. Section 34(2)(b), which deals with a situation in which the security interest of SP is taken after the goods become fixtures, operates in essentially the same way as section 34(2)(a) with the exception that A is placed in a very different position. He, along with Bank X, Bank Z and C has priority over SP unless he consents in writing to SP's security interest or disclaims an interest in the goods as fixtures.

5. Section 34(4) parallels sections 21 and 32(1.1) by giving to SP a 15 day grace period for compliance with sections 34(3) and 49.

6. The remaining subsections of section 34 are directed to the regulation of secured parties who have the legal right to have goods removed which have become fixtures to real property and the right of persons with interests in the property. Section 35(5) prescribes in general terms the standard of conduct which the secured party must meet.

7. Sections 34(6)-(8) give a right of compensation for removal damages to a person who has an interest in the real property at the time the goods subject to the security interest are affixed. In the scenario set out in paragraph 3 above, this would include A and bank Z. The section does not extend to holders of subsequent interests because it is assumed that when they acquired their interests they were aware or should have been aware as a result of registration of the security interest that there was a risk of damage to the real property resulting from removal of the fixture.

8. Section 34(9) gives to a person with an interest in the real property subordinate to that of the person with a security interest in the fixture the right to "buy out" the security interest and prevent removal of the fixture. To do so, he must pay the amount secured by the security interest. Sections 34(10)-(12) specify the procedural obligations of the secured party and the rights of the owner of the real property in cases where section 34(9) applies.

Security interests re: accessions

35(1) In this section,

(a) "other goods" means goods to which accessions are affixed or attached;

(b) "the whole" means accessions and the other goods.

(2) Subject to subsections (3) and (4) and section 36,

(a) a security interest in goods that attached before they became accessions has priority with respect to the goods over the claim of any person who has an interest in respect of the whole, and

(b) a security interest in goods that attached after they became accessions has priority over the claim of any person who subsequently acquired an interest in the whole, but not over any person

(i) who had an interest in the whole at the time the security interest in the whole attached, and

(ii) who has not consented in writing to the security interest or disclaimed an interest in the accession as part of the whole.

(3) A security interest mentioned in subsection (2)

(a) is subordinate to the interest of

(i) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances, and

(ii) a subsequent purchaser for value of an interest in the whole,

if the subsequent advances under the prior perfected security interest or subsequent purchase is made or contracted for without notice, after the goods become accessions and before the security interest is registered or perfected, and

(b) is subordinate to the interest of

(i) a creditor of the debtor, and

(ii) a sheriff

who have caused the whole to be seized under judicial process to enforce a judgment, if the seizure occurs under circumstances referred to in section 19(1)(a)(i) or (ii) before the security interest is perfected.

(4) No interest of a creditor or of the sheriff mentioned in subsection (2)(b) takes priority over a purchase money security interest in the accession goods that is registered or perfected not later than 15 days after the day the debtor, or third party at the request of the debtor, obtains possession of the collateral.

(5) A secured party who has the right to remove accession goods from the whole shall exercise his right of removal in a manner that causes no greater damage or injury to the other goods, or that puts the person who is in possession of the whole to no greater inconvenience, than is necessarily incidental to the work of removing the accession goods from the other goods.

(6) Any person, other than the debtor, who has an interest in the other goods at the time the goods subject to a security interest become an accession to the other goods is entitled to reimbursement for any damage to his interest in the other goods resulting from the removal of the accession goods, but is not entitled to reimbursement for diminution in the value of the other goods resulting from the removal of the accession goods caused by the absence of the accession goods removed or by the necessity for replacement.

(7) The persons entitled to reimbursement as provided in subsection (6) may refuse permission to remove the accession goods until the secured party has given adequate security for the reimbursement.

(8) The secured party may apply to a court for any one or more of the following orders:

(a) determining the persons entitled to reimbursement under this section;

(b) determining the amount and kind of security to be provided by the secured party;

(c) prescribing the depository for the security;

(d) dispensing with the consent of any or all of the persons mentioned in clause (a).

(9) A person having an interest in the other goods that is subordinate to a security interest by virtue of subsection (2) may, before the accession goods have been removed from the other goods, retain the whole on payment to the secured party of the amount secured by the security interest having priority over his interest.

(10) The secured party who has the right to remove accession goods from the whole shall serve, on each person known to him as having an interest in the other goods and on any person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the serial number where such is required, a notice in writing of his intention to remove the accession goods, which shall contain

(a) the name and address of the secured party,

(b) a description of the accession goods to be removed sufficient to enable them to be identified,

(c) the amount required to satisfy the obligations secured by his security interest,

(d) a description of the other goods sufficient to enable them to be identified, and

(e) a statement of intention to remove the accession goods from the whole unless the amount secured is paid on or before a specified day that is not less than 12 days after service of the notice in accordance with subsection (11).

(11) A notice mentioned in subsection (10) shall be served at least 15 days before removal of the accession goods and may be served in accordance with section 70 or, in the case of a person who has registered a financing statement, by registered mail addressed to the address of the person to be served as it appears on the security agreement or financing statement.

(12) Any person entitled to receive a notice under subsection (10) may apply to a judge for an order postponing removal of the accession goods from the whole, and the judge may make any order that he considers just and reasonable.

COMMENT:

1. This section provides a structure, closely paralleling that of section 34, for the regulation of competing claims where goods in which a security interest has been taken are attached to or installed in other goods. The Bill uses the term "accessions" to refer to the goods which are installed or attached to the other goods. The common law test or tests as to when goods become in law accessions to other goods is displaced. Under sections 1(1)(a) and 35, the degree or manner of attaching or installation does not have the significance it has at common law in the determination as to whether or not goods are accessions to other goods. Section 35 applies to a security interest in any goods installed in or affixed to other goods.

2. While the structure of section 35 parallels that of section 34, the two sections do not operate with equal efficacy. The reason for this is that there is no direct counterpart in section 35 to registration of the security interest in the goods in a title based registry such as a Land Titles Office. This point is displayed in the following scenario. SP sells a truck box to D under a security agreement providing for a security interest in the box. D installs the box on a truck owned by A. SP registers his security interest in the truck box using D's name as the registration criterion. There is no requirement in section 35 that SP obtain the serial number of the truck in which D has installed the box and include that in his financing statement. A sells the truck to B who, before buying the truck, obtained a search result from the registry using A's name and the serial number of the truck as the search criteria. SP's security interest will not be disclosed; yet, B takes subject to that interest.

The same result prevails in the situation involving the same pattern as that set out in the preceding paragraph with the exception that D owns the truck. D sells the truck and box to B who in turn sells it to C. Before buying, C conducts a search of the registry using B's name and the truck serial number as search criteria. Again, SP's security interest in the box will not be disclosed, yet C will take subject to it.

A superficially attractive solution to this dilemma lies in a requirement that SP keep a close watch on his collateral so as to identify the goods to which his collateral becomes affixed. He can then be required to include on a financing statement the serial number of the goods. However, in the great bulk of situations this scheme would be unworkable. In the first place, not all types of goods have serial numbers reliable enough for use as registration criteria. Further, it is commercially unreasonable to require SP to follow his collateral around so as to be in a position to identify the goods to which it has been affixed. For example, large industrial tires are frequently sold under secured instalment sales contracts. It is unrealistic to require the seller to include on his financing statement the serial numbers of the trucks or equipment on which those tires are periodically installed.

Continuity of perfected security interests

36(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

(2) If more than 1 perfected security interest attaches to the product or mass, the security interests in the product or mass rank equally, according to the ratio that the obligation secured by each security interest entitled to share bears to the sum of the obligation secured by all the security interests.

COMMENT:

1. This section deals with a somewhat different situation than does section 35. It is assumed in the context of section 35 that there is a dominant chattel to which the accessory chattel is affixed. The dominant chattel does not lose its separate identity, it simply takes on an added feature. However, section 36 deals with a situation in which quantities of two or more separate items of goods are combined to make a mass or product under circumstances in which their separate identity is lost. Section 36(1) implies that a security interest in goods which go into the product or mass is lost so far as those goods are concerned; however, it provides that the security interest "continues in the product or mass". While the section does not specifically so state, it is likely that continued perfection of the security interests in the product or mass would require in some cases at least the registration of a financing change statement so as to amend the collateral description to refer to the product or mass.

2. Section 36(2) prescribes a priority rule applicable in cases where more than one security interest continues in the product or mass. The operation of the section is illustrated in the following scenario. D is a candy manufacturer. He obtains sugar from SP I under a secured credit arrangement giving SP I a security interest in the sugar supplied by him. His indebtedness to SP I equals $10,000. D obtains chocolate from SP II under a security arrangement under which SP II has a security interest in the chocolate supplied by him. D's indebtedness to SP II is $15,000. D manufactures some candy from the sugar and chocolate but, before it is sold, SP II has it seized as a result of D's default in performance of his obligations under the security agreement with SP II. Since SP I and SP II rank "equally", the proceeds of sale of the candy cannot be allocated exclusively to SP II's debt. If the candy is sold for $20,000, section 36(2) prescribes that this amount is distributed as follows:

SP I: $10,000 - $25,000 x $20,000	$ 8,000
SP II: $15,000 - $25,000 x $20,000	$12,000

3. Section 36(2) would not apply if the priority competition involved one secured party with a security interest in the product or mass created under a security agreement and not by operation of section 36(1). For example, if in the scenario described above SP I's security interest in the product was created by a security agreement under which SP I was given a security interest in all of D's present and after-acquired property, the applicable priority rule would be section 32(1) which would give SP II first priority so long as he had perfected his security interest in the candy as proceeds.

Subordination of interest

37 A secured party may, in a security agreement or otherwise, subordinate his security interest to any other security interest.

COMMENT:

This section facilitates a practice very common in modern business financing. Frequently, a secured party who has a first registration position or a superior priority is prepared to subordinate his status to another secured party with an inferior priority. Of course, the agreement between the two parties does not affect the priority position of other persons not parties to the agreement. The existence of a subordination agreement can be given public recognition through registration of a financing change statement in the registry. See section 54.

Rights of an assignee

38(1) Unless a debtor with respect to an intangible has made an enforceable agreement not to assert defences or claims arising out of a contract, the rights of an assignee of the intangible paper are subject to

(a) the terms of the contract between that debtor and the assignor and any defence or claim arising therefrom, and

(b) any other defence or claim of that debtor against the assignor that accrued before the debtor received notice of the assignment.

(2) To the extent that the right to payment or part payment under an assigned contract right has not been earned by performance, and notwithstanding notice of the assignment, any modification of, or substitution for, the contract made in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's right under the contract or the assignor's ability to perform the contract is effective against an assignee unless the debtor with respect to an account or chattel paper has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

(3) Nothing in subsection (2) affects the validity of a term in an assignment agreement that provides that a modification or substitution mentioned in that subsection is a breach by the assignor.

(4) The debtor with respect to an intangible may pay the assignor until he receives notice that the amount due or to become due under an identified transaction has been assigned and that payment is to be made to the assignee.

(5) A debtor with respect to an intangible may pay the assignor, if the assignee, when requested to do so by the debtor, fails to furnish to the debtor proof within reasonable time that the assignment has been made.

(6) A term in a contract relating to an account that prohibits assignment of the whole of an account is ineffective.

COMMENT:

1. Section 38 prescribes inter partes rights in situations where an intangible has been assigned. Of course, this section will not apply to all assignments of intangibles. See section 3. While the rules prescribed follow the general pattern of section 21(1) of the Judicature Act R.S.A. 1980, c. J-1, in some important respects they amplify and modify established law dealing with assignments of those types of choses in action which fall within the definition of intangible. See section 1(1)(k).

2. Section 38(1) parallels in most respects section 21(1) of the Judicature Act. However, it goes further by making reference to an agreement in which a debtor on an intangible undertakes not to assert defences or claims arising out of the contract under which the intangible arose. This is a reference to the ubiquitious cut-off clauses or waiver of defence clauses found in secured instalment sales contracts which are sold as chattel paper. Under section 48 of the Law of Property Act R.S.A. 1980, c. L-8 (see also Bill 73, section 28) such an agreement is void when contained in a consumer credit contract. Section 38(1) does not purport to effect change in the law in this respect. See also section 73(1). Whether or not such an agreement is enforceable in any other context is determined by the common law. Section 38(1) is neutral on the issue.

3. Section 38(2) represents a modification of existing law. It is designed to provide some flexibility to parties to a contract in cases where the right to payment under the contract has been assigned to a third party. Under current law, the assignee of the contract rights must consent to any modification of the contract if the modification affects his rights in any way. This is commercially unrealistic. Section 38(2) states a rule which gives the needed flexibility without substantially prejudicing the position of the assignee.

4. Sections 38(4) and (5) provide amplification of existing choses in actions law with respect to the obligations of payment by a debtor. The sections are supplemented by section 21(2) of the Judicature Act.

5. Section 38(6) is designed to reverse what appears to be existing law. While the issue remains in doubt, there is authority for the position that a clause in a contract between A and B under which B agrees not to assign his right to payment arising under the contract is effective to deprive C, the assignee of B's rights under the contract, from enforcing the rights against A.

From a policy point of view the choice between enforceability and unenforceability of such clauses is not easily made. In favour of enforceability is the proposition that A and B should be able to make any contract they wish and their wishes should be respected by the law so long as illegality is not involved. On the other side is the long standing hostility toward inalienability of personal property rights. If A sells a car to B under a contract providing that B will not sell the car to C, any such sale is effective to pass property in the car to C. A right to payment is property and its alienability should not be prevented by contract any more than the sale of B's interest in the car can be prevented.

Section 38(6) embodies the position favouring alienability of property rights. However, this section is based more on practical commercial considerations than on theoretical ones. Clauses prohibiting assignment of payment rights are found most frequently in contracts between small suppliers and large buyers. This type of clause is inserted at the insistance of the buyer who does not want to be bothered with having to deal with an assignee or who wants to retain his set off rights. The supplier does not have the bargaining power to resist the demands of the buyer. If the clause is given legal effect, sources of financing otherwise available to suppliers will be cut off. Frequently, the supplier's accounts are the most valuable asset he has. If he cannot factor those accounts or offer them as security for operating loans, his ability to remain in business in jeopardized.

The policy of section 38(6) is embodied in sections 4.11(3) and (4)of the Uniform Sale of Goods Act recommended for adoption in Alberta by the Alberta Institute of Law Research and Reform. See Report No. 38, the Uniform Sale of Goods Act, October, 1982, pages 246-247.

It should be noted that there is nothing in section 38(6) which makes ineffective a clause in an agreement which prohibits fractional assignments of payments earned under the contract. A buyer should not be required to deal with two or more assignees of portions of the same account.

PART 4
REGISTRATION

GENERAL COMMENT:

Continuation

The Personal Property Registry, which operated under the authority of the Chattel Security Registries Act, S.A. 1983, C-7.1 as the Central and Vehicle Registries, will operate as a single entity under Bill 73. In addition, registration previously included in Part 7 of the Business Corporations Act will be included within the scope of the Registry. Thus there will be a single registry for all security agreements; it will be centralized and computerized.

As provided in the transitional sections of Bill 73, the Registry will continue to maintain and provide public access to all of the active registrations in the Central and Vehicle Registries. Consequently it will not be necessary to re-register under the Personal Property Security Act, registrations existing under the Chattel Security Registries Act when the former act is proclaimed and the latter act rescinded.

Forms

Registrations will be effected through the use of forms called financing statements and financing change statements. To explain how to complete correctly these forms, there will be a registration guide. Each form will be in two parts, with the first part being submitted to the Registry for registration and the second part retained by the registering party.

Scope of Registration

Under the Registry System, a single financing statement, if properly drawn, can perfect by registration security interests involving a large number of items or types of collateral arising under several agreements between two parties. In addition, a registration can be made before a security agreement is entered into or the security interest attaches. See section 48. This feature accommodates the priority position of secured parties under the first to register rule. See section 33(1). Within the limits prescribed, the registering party can also choose the duration of his registration or renewal. See section 51(2). For amendments, the remaining period of the registration would be unchanged, while for discharges the registration period would be terminated and the record purged from the system. With one minor exception (see section 33(6)), there is no provision for late registration; therefore, renewals must be made prior to the expiration of the existing registration. See section 51(1).

The Personal Property Registry will also be used for the registration of a number of non-security interests as provided in the Employment Standards Act, Garagemen's Lien Act, Matrimonial Property Act, The Customs Act (Canada), section 27 of the Sale of Goods Act, and section 8 of The Factors Act. (See sections 82 to 84, 89 and 94). Inclusion of these items enhances the ability to make commercial decisions on the basis of a much more complete record than was previously possible.

Collateral Descriptions

The Personal Property Regulations will require that a description of the collateral involved be entered on financing statements. Three different methods of describing collateral will be prescribed. Detailed descriptions of specific items of collateral will be required in some cases, and generic descriptions of collateral in others. In addition, it will be possible to use an "all present and after-acquired property" description in appropriate cases. Under Bill 73 goods are categorized by use, being either: consumer goods, equipment or inventory. This has implications to the way collateral is described on financing statements and financing change statements. Thus, space will be provided on financing statements and financing change statements for formatted descriptions.

Other space will be provided for narrative descriptions. As Bill 73 recognizes the rights to proceeds, some accommodation will also be provided for proceeds collateral.

When the registered financing statement or financing change statement involves an interest in fixtures, the registering party can register a notice, in the prescribed form, in the Land Titles Office. See section 49.

Registry Offices

Registrations can be made by delivery of statements to the Edmonton office in person or by mail and to the Calgary office by delivery in person. Due to the importance of accuracy in registration information, all data entry is carried out in Edmonton.

The registration system is a notice type, with no provision to register security agreements. The notice contains only basic information, such as, the names and addresses of the secured party and debtor and the description of the collateral. Information on the relationship between the debtor and secured party, including the amount secured is not part of the public record but can be acquired by appropriate persons through inquiry directed to the secured party. See section 17.

Registration Process

Because of the importance of the information contained in the Personal Property Registry, it is necessary to employ error identification measures before information is entered. This results in some inevitable interval between tender of financing statements and their registration.

Procedures for the registration of financing statements and financing change statements begin with an extensive examination of the statement by Registry personnel to ensure that its contents are complete and in the form required for computer input. Since a financing change statement always amends an existing registration, measures are taken to ensure that the debtor name and registration number on the financing change statement exactly match those on the registration to be amended. If the statement is not in proper form or if, in the case of a financing change statement, the exact match cannot be found, the statement is returned to the registering party along with a notice and an explanation of why the statement cannot be registered.

After examination, statements in proper form are assigned a sequential registration number indicating the time and date of registration. See section 41(2). The statements are then made ready for data entry.

Data entry involves the complete keying of each statement twice, in order to ensure that information is entered as presented. Once all statements have been keyed and verified, they are transmitted to a computing centre where the data base is updated and the new statements are made available for searching. Thereafter, a review is conducted by Registry officials, provision is made for errors and a currency date for searches is established. The statements are then sorted into registration number sequence and are microfilmed. Throughout this process procedures are employed to track statements to ensure that all registrations end up on the data base or are otherwise accounted for and that all registered statements are microfilmed and then destroyed. Finally, a computer report dealing with the numbers assigned to statements is obtained to ensure that all registration numbers assigned are on the data base or accounted for.

A Verification Statement will be issued after successful update of the registration on to the data base and is sent to the registering party. This Verification Statement confirms that the registration has been made and can also be used for error correction and discharge.

Discharges

The Verification Statement is designed so that it can also be used to discharge registrations. To encourage the removal of inactive registrations from the data base, no fee will be charged for discharges. All discharged registrations are removed from the data base as soon as possible.

A Notice of Discharge is provided to a secured party when his registration is discharged from the system. This is designed to ensure that only the correct registrations are discharged and to minimize the damage resulting from unauthorized discharges. See section 33(6).

Any person named as a debtor in a statement registered at the Registry, may demand discharge or amendment of a registration if no security agreement was entered into, if all of the obligations under a security agreement are performed, or if the collateral description includes the type or item not included in the security agreement. See section 52.

Access to Registry Information

As far as reasonably possible, there will be province-wide access to the information contained in the Registry. This information will be available by attending at the offices of the Registry in Edmonton and Calgary, as well as, at outlying Registry offices established at eleven Court Houses located strategically throughout the province. Remote access for account holders is available via telephone, Telex or TWX.

Searches can be conducted against business debtor names, individual debtor names, registration numbers and, as prescribed by the regulations, certain serial numbers. See section 44(1). The search results include all registrations that exactly match the searching key plus an index of inexacts closely approximating the key. Coding systems are used for all debtor names and serial numbers to minimize negative legal consequences associated with minor errors made when recording crucial data on financing statements. See section 69(1).

Search Results

Search results will either be printed or verbal. In both cases, they will contain the full history of the registration.

All search results contain information with respect to the currency date. That date indicates that all registrations made on that date have been successfully updated to the data base. This date will be kept as close to the date of issue as is possible and commercially acceptable.

All search results, both verbal and printed, go on to microfiche. This provides a continuous record of the searching party, the information that was requested and the information that was provided in the search result.

Assurance Fund

A portion of each registration fee is directed towards the Personal Property Assurance Fund. This fund is a source of compensation to persons who suffer loss or damage as a result of an error in the operation of the Registry. See section 46.

Personal Property Registry

39(1) There shall be a registry to be known as the Personal Property Registry for the purposes of registrations under this Act and for registrations that are permitted or required under any other Act to be made in the Registry.

(2) The Registrar of Personal Property shall have a seal of office in the form prescribed by the Minister.

COMMENT:

This section creates a single Registry, the Personal Property Registry, that replaces three different registries, the Central Registry, the Vehicle Registry and the Corporate Registry. This single registry is a reflection of the philosophy to consolidate the law of secured interests in personal property.

Appointments

40(1) The Minister may designate in writing an empioyee under his administration as the Registrar of Personal Property.

(2) The Registrar of Personal Property may designate in writing employees under the administration of the Minister as deputy registrars and may specify their powers and duties.

(3) The Registrar shall, under the direction of the Minister, direct and supervise the operation of the Registry.

COMMENT:

This section sets out the officers that administer the Personal Property Registry.

Registration of documents

41(1) A financing statement required or permitted to be registered under this Act may be submitted for registration at any office of the Registry that is specified by the Minister as an office where such statements may be submitted for registration.

(2) Registration of a financing statement in a registry is effective only from the time assigned to the statement in the office of the Registry designated by the Minister as the central office of the Registry and where 2 or more documents are assigned the same effective time, the order of registration shall be determined by the registration numbers.

(3) The Registrar may refuse to register a financing statement submitted for registration if it does not, in his opinion, comply with this Act or the regulations.

(4) The Registrar shall not register a financing statement or make a search under section 44 until the fees payable in respect of the registration or search, as the case may be, have been paid or, pursuant to an agreement entered into under the regulations, charged to the account of the person who is submitting the statement for registration or requesting that the search be made.

COMMENT:

1. Section 41(1) allows for designation of offices for registration of financing statements and financing change statements under the Act.

2. Section 41(2) indicates that registration is effective only from the time assigned to a financing statement at the central office of the Registry. It also deals with the problem which arises when two or more statements are assigned the same time. In that case the order of registration will be determined by registration number.

3. Section 41(3) provides for power in the Registrar to refuse registration of a financing statement or a financing change statement if the statement does not comply with the Act or regulations. This power is to ensure the consistency of the data that is stored in the recording system.

Maintenance of records

42 When a financing statement is registered in the Registry, the Registrar may have the statement photographed on microfilm and a statement on microfilm is for all purposes deemed to be a statement registered in the Registry.

COMMENT:

This section allows for the microfilming of registered statements and that the microfilmed version of the statement will be effective for all purposes as a statement registered in the Registry. This microfilmed version is kept as a permanent record in the Registry.

No constructive notice

43 Registration of a financing statement in the Registry does not constitute knowledge of its contents or constructive notice to third parties.

COMMENT:

1. Section 43 consigns to legal history the concept of constructive notice in the context of the registration of security interests in personal property. It has no place in a system of the kind embodied in the Bill. Constructive notice is important only in a situation in which the rights acquired by someone depend upon whether or not the acquisition was made with or without knowledge on the part of such person. Where such person did not have actual knowledge of a prior interest, but had the ability to obtain such knowledge by conducting a search of a registry, some courts have concluded that the person has constructive notice, although not actual knowledge of the prior interest. For example: A gives to B a mortgage on property to be acquired by A in the future. B registers his mortgage under the Bills of Sale Act and Chattel Security Registries Act. Since B's mortgage is on future property, B can acquire only an equitable mortgage which comes into existence when A acquires the property. After the property is acquired by A, he sells to C who is a good faith purchaser of it. C fails to conduct a search of the Registry and has no knowledge of B's equitable mortgage. Under the law of sales, C acquires a legal title to the property. The result is that the prior equitable title of B arising under his equitable mortgage is in conflict with the subsequent legal title of C. A principle of equity is that a subsequent legal interest acquired for value and without notice of a prior equitable interest defeats the equitable interest. C acquired a legal interest, but was he without notice of B's interest? He had no actual knowledge of it; but it was registered and he could have discovered the existence of it by conducting a search of the Registry. Some courts have concluded that in a situation of this kind C has constructive notice and, therefore, cannot take advantage of the fact that he acquired a legal title. In effect they have concluded that registration of the equitable mortgage is constructive notice to the world of its existence. Our courts have ruled that registration under the Bills of Sale Act does not constitute constructive notice. Similar decisions have been reached in the context of Assignment of Book Debts Acts and Corporation Securities Registration Acts.

Constructive notice plays no role in the Registry and priority systems of Bill 73. In some situations, priority rules involve the question of notice or knowledge. See sections 5(2), 19(1), 28, 29 and 33(4). However, it is clear that something other than constructive notice, as the concept is traditionally understood, is involved. Section 71 provides the definition of notice or knowledge applicable to these sections. Essentially there must be an actual communication of information under circumstances "in which a reasonable person would take cognizance of it".

Apart from the priority rules contained in the sections noted in the preceding paragraph, notice or knowledge, actual or constructive, is irrelevant except to the extent that it is an element of bad faith. See sections 33(1) and 65(1). As is the case under the Torrens system of land registration, priority results from the fact that the prescribed steps have been taken, not because third persons are deemed to be aware or have constructive knowledge of the fact that the steps have been taken.

Requisitions from Registry

44(1) A person may, in accordance with the regulations, request at the Registry

(a) that a search be made against the name of a debtor,

(b) that a search be made according to a serial number for collateral prescribed for registration by serial number,

(c) that a certificate as to the results of a search mentioned in clause (a) or (b) be issued to him, or

(d) that a certified copy of any registered financing statement be provided to him.

(2) If approved by the Minister, searches may be requested and provided in a manner other than that described in subsection (1).

(3) A printed search result issued under subsection (1)(c) and certified by the Registrar is receivable in evidence as prima facie proof of its contents without proof of the signature or official position of the Registrar.

(4) A copy of a registered financing statement certified by the Registrar shall, without proof of the signature or official position of the Registrar, be admitted in evidence as prima facie proof for all purposes as if the registered statement were produced.

(5) The date and time of the registration of a financing statement as shown on a certificate issued under subsection (3) or (4) is prima facie proof as to the date and time of the registration of the statement.

COMMENT:

This section deals with searches made at a Registry. Generally, searches will be conducted against the name of a debtor except for those registrations that may be allowed to be registered by serial number, in which case searches will be conducted by serial number.

Personal Property Security Assurance Fund

45(1) The Chattel Security Registries Fund is continued as the Personal Property Security Assurance Fund, into which shall be paid the fees prescribed to be paid into the Fund.

(2) The Fund shall be held and administered by the Provincial Treasurer and the fees prescribed to be paid into the Fund shall be paid over to the Provincial Treasurer at the times and in the manner that he may direct.

(3) The whole or a part of the Fund in excess of the prescribed amount may, at the direction of the Provincial Treasurer, be invested in any class of investments or securities enumerated in section 50(1) of the *Financial Administration Act*.

(4) An amount of the Fund in excess of the prescribed amount may, at the direction of the Provincial Treasurer, be transferred to the General Revenue Fund.

COMMENT:

This section continues the Chattel Security Registries Fund as the Personal Property Security Assurance Fund.

Claims for damages

46(1) Subject to this section, any person who suffers loss or damage as a result of his reliance on a certified copy of a registered financing statement or a certificate as to the results of a search that is incorrect because of an act or omission in the operation of the Registry may bring an action against the Registrar in the Court for recovery of damages, but no award of damages to any single claimant shall exceed the prescribed amount.

(2) No action for damages under this section lies against the Registrar unless it is commenced not later than 1 year after the time of the loss or damage.

(3) An action for recovery of damages under this section brought by a trustee under a trust indenture or any person with an interest in a trust indenture shall be brought as an action on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the Registrar in respect of the act or omission.

(4) In an action brought by a trustee under a trust indenture or by any person with an interest in a trust indenture, proof that each person relied on the registered financing statement or printed search result is not necessary if it is established that the trustee relied on the registered financing

statement or printed search result, but no person is entitled to recover damages under this section if he knew at the time he acquired his interest that the registered financing statement or printed search result relied on by the trustee was incorrect.

(5) No action under this section may be brought by a person who relied on the certified copy of a registered financing statement or certificate as to the results of a search unless that person or his agent requested the certified copy or certificate.

(6) Notwithstanding the *Proceedings Against the Crown Act*, no action shall be brought against the Crown in right of the Province, the Registrar or any officer or employee of the Registry for any act or omission of the Registrar or an officer or employee of the Registry in respect of the discharge or purported discharge of any duty or function under this or any other Act or under the regulations under any Act other than as provided in this section.

COMMENT:

1. This section sets out the grounds for an action against the Registrar. It prescribes a limitation period of one year after the time of loss or damage and the regulations will spell out the limits of an award to any single claimant.

2. In order to avoid a multiplicity of actions in the case of a trust indenture, this section sets out the procedure for a claim by a trustee. Monetary limits to claims of this nature are prescribed by regulation under section 47.

3. Section 46(6) limits the right of action to a claim against the Assurance Fund.

Payment of claims

47(1) The total of all claims for compensation paid under section 46(3) and (4) in any single action shall not exceed the prescribed amount.

(2) In proceedings under section 46(3) and (4), the Court may make any order that it considers appropriate in order to give notice to the persons with interests in the same trust indenture.

(3) Subject to subsection (1), the Court may order payment of all or a portion of the damages awarded to identified persons with interests in the same trust indenture at any time after judgment, and the obligation of the Registrar to satisfy the judgment is satisfied to the extent that payment is made.

(4) The Provincial Treasurer may, without an action being brought, pay the amount of a claim against the Registrar from the Fund when authorized to do so by the Minister on the report of the Registrar setting forth the facts and on receipt of a certificate of the Registrar that in his opinion the claim is just and reasonable.

(5) When an award of damages has been made in favour of the claimant and the time for appeal has expired, or when an appeal is taken and it is disposed of in favour of the plaintiff, the Provincial Treasurer shall authorize payment out of the Fund in the manner and in the amount specified in the judgment, including any costs awarded to the claimant.

(6) When damages are paid to a claimant under section 46 or this section, the Crown is subrogated to the rights of the claimant against any person indebted to the claimant whose debt to the claimant was the basis of the loss or damage in respect of which the claim was paid.

COMMENT:

1. Section 47(1) sets out that there will be a monetary limit prescribed by regulation to claims arising under section 46(3) and (4).

2. Section 47(4) continues provisions of the Chattel Security Registries Act that allow payment of claims in appropriate circumstances without an action being brought.

3. Section 47(6) subrogates the Crown to the rights of the claimant against persons indebted to the claimant which formed the basis for the claim made against the Registrar.

Registration of statements

48 Subject to this Act, a financing statement or a financing change statement may be registered before the security agreement is made or before the security interest attaches.

COMMENT:

This section is important in considering section 18 and section 23 of the Act dealing with perfection of a security interest. Registration can occur before a security interest has attached but perfection does not occur until attachment has taken place. The date of registration is important however because section 33 of the Act (the general priority provision) allows for priority of a perfected security interest to be determined by the registration date. A similar result follows in relation to purchase money security interests under section 32 and security interests in accessions under section 35.

Notice in land titles office

49(1) In order to take priority over interest in real property in accordance with section 34, a person shall register a notice in the prescribed form in the land titles office and on its being so registered, the registrar of the land titles office shall make a memorandum of the notice on the certificate of title or the condominium plan, as the case may be, in respect of the parcel of land to which the notice relates.

(2) If a notice has been registered in the land titles office under subsection (1) and the registration of the notice has not expired, notice of a financing statement renewing, amending, assigning or discharging the security interest to which the original notice relates, or of a financing statement subordinating the security interest to another security interest, may be registered in the land titles office in the prescribed form, and, on its being so registered, the registrar of the land titles office shall make a memorandum of it on the proper certificate of title.

(3) Section 51 applies, with all necessary modifications, to a notice registered under this section.

(4) A security interest in fixtures may be perfected as a security interest in goods without a notice's being registered under subsection (1).

(5) If the registering of a notice of a security interest in fixtures expires, the registrar of the land titles office may vacate the registering of the notice and any other notice that relates to the same security interest and may strike out any memorandum of the notice that is made on the certificate of title.

(6) A notice registered under subsection (1) or (2) may be discharged by registering a certificate in the prescribed form in the land titles office.

(7) If a notice is registered under subsection (1) and

(a) all the obligations under the security agreement are performed,

(b) it is agreed to release part of the collateral in which a security interest is taken on payment or performance of certain of the obligations under the security agreement, then on payments or performance of those obligations, or

(c) the notice purports that the secured party has a security interest in property of the debtor in which the secured party does not have, or is not entitled to claim, a security interest,

any person having an interest in the collateral, the registered owner of the real property or any other person claiming an interest in the real property may contest the registration of the notice according to the procedure established in the *Land Titles Act* for contesting the registration of a caveat.

COMMENT:

This section is to be read in conjunction with section 34 dealing with security interests in fixtures under the Act. In order for such an interest to take advantage of the priorty system under section 34, registration of a Notice in the Land Titles Office must occur. This section allows for amendments to the Notice so filed; vacating of a registration by the Registrar of Land Titles and for a process of discharge. It also provides for a procedure whereby landowners or other persons with an interest in land may contest registration of a Notice by the procedure set out in the Land Titles Act for contesting the registration of a caveat.

Amendment to registered financing statement

50 An amendment in the prescribed form to a financing statement registered under this Act may be registered at any time during the period that the registration of the statement is effective, and the amendment is effectively registered as to the change from the time of registration of the amendment.

COMMENT:

This section only allows for amendments to a financing statement during the effective time of registration of that statement.

Renewal of registration

51(1) If a financing statement has been registered with respect to a security interest, the registration may be renewed by registering a financing change statement at any time before the financing statement to which it refers expires.

(2) Subject to the regulations, registration under this Act of

(a) a financing statement is effective for the length of time indicated on the financing statement, and

(b) a financing change statement renewing the registration is effective for the length of time indicated on the financing change statement.

(3) Financing statements and financing change statements referring to a financing statement, or information provided on a financing statement or financing change statement, as the case may require, may be removed from the records of the Registry

(a) when the financing statement is no longer effective,

(b) on the receipt of a financing change statement discharging or partially discharging the financing statement,

(c) if the secured party fails to register an order of the Court maintaining the financing statement under section 52(3), or

(d) on receipt of an order of the Court compelling the discharge or partial discharge of a financing statement or a financing change statement.

COMMENT:

1. Section 51(1) allows for renewal of a financing statement.

2. Unlike prior law, section 51(2) allows for flexibility in secured transactions such that the time for which a registration may be effective may be tailored to the needs of the parties and the term of the transaction contemplated.

3. Section 51(3) allows for clearing of the records of the Registry automatically when a registration expires, upon discharge or partial discharge a financing statement, upon the failure of a secured party to register a court order within the 40 days mentioned in section 52(3), or upon order of the court.

Financing change statement as discharge

52(1) Where a financing statement relating to a security interest in consumer goods is registered, the secured party shall register, not later than 1 month after all obligations under the security agreement creating the security interest are performed, a financing change statement discharging the financing statement unless prior to the expiry of 1 month the registration of the financing statement ceases to be effective.

(2) Where a financing statement is registered under this Act and

(a) all the obligations under the security agreement to which it relates are performed,

(b) it is agreed to release part of the collateral in which a security interest is taken on payment or performance of certain of the obligations under the security agreement, then on payment or performance of such obligations, or

(c) the description of the collateral contained in it includes a type or item of property that is not collateral under a security agreement between the secured party and the debtor,

any person with an interest in property of the debtor falling within the collateral description contained in the financing statement may serve a written demand on the secured party demanding a financing change statement, which, when registered,

(d) in a case falling within clause (a) discharges the registration,

(e) in a case falling within clause (b) amends the collateral description to include only the types or items of property not released, and

(f) in a case falling within clause (c) amends the collateral description to exclude the types or items of personal property that are not described as collateral under a security agreement between the secured party and the debtor,

and the secured party shall sign and deliver or send to the Registry the financing change statement not later than 15 days after service of the demand.

(3) If the secured party fails to deliver the required financing change statements not later than the time provided by subsection (2), the person who has made the demand may require the Registrar to serve a notice in writing on the secured party stating that registration of the financing statement will be discharged or that a part of the collateral will be released, as the case may be, on the expiration of 40 days after the day the Registrar served the notice on the secured party, unless in the meantime the secured party registers an order of the Court accompanied by a financing change statement maintaining the registration of the interest of the secured party.

(4) The demand mentioned in subsection (2) and the notice mentioned in subsection (3) may be served in accordance with section 70 or by registered mail addressed to the address of the secured party as it appears on the security agreement or financing statement.

(5) On application to the Court by a secured party, the Court may order that the registration of a financing statement

(a) be maintained on any conditions and, subject to section 51, for any period of time that it considers just, or

(b) be discharged or that a financing change statement releasing the collateral or part of the collateral be registered, as the case may be.

(6) Subsection (3) does not apply to a financing statement or a financing change statement registered with respect to a security interest taken under a trust indenture if the financing statement indicates that the security agreement with respect to which the financing statement was registered is a trust indenture.

(7) If the secured party fails to deliver the financing change statement demanded under subsection (2), the person making the demand may apply to the Court, on notice to all persons concerned, for an order directing that the financing statement or financing change statement be removed from the Registry.

(8) No fee or expense shall be charged and no amount shall be accepted by a secured party for the preparation or registration of a financing change statement under this section.

COMMENT:

This section is a key feature of the system for registration of security interests prescribed by the Bill. It is designed to deal primarily with three situations:

(i) It will be noted that under section 48 financing statements can be registered before a security agreement has been executed. The regulations will provide that a financing statement need not contain the signature of the person named as debtor.

(ii) It will also be noted that variable registration is provided for by the Bill. See section 51(2). In other words, a registering party will be able to choose the registration life of his financing statement, including registration for long periods of time.

(iii) The regulations will prescribe rules for collateral description on financing statements. They will permit, in some cases, the use of generic collateral descriptions such as "automobiles". There will be no requirement in such cases to state which particular automobiles or how many automobiles are collateral under the security agreement. It will also be possible in some circumstances to use an "all present and after-acquired property" collateral description.

Pre-agreement registration, variable life registration and generic or all property collateral descriptions are designed to give maximum flexibility to secured parties, particularly where inventory financing is involved. These features of the Bill are an important aspect of the philosophy of the Bill to relieve registering parties from unnecessary registration requirements.

It is clear, however, that the great flexibility given to registering parties could be abused. Financing statements may be registered in anticipation of dealings with certain persons but not discharged when it becomes clear that those dealings will not occur. When a period of registration chosen by a secured party exceeds the life of a security agreement with a particular debtor, the secured party may fail to discharge the registration when the security agreement is performed. An overly broad collateral description may prevent a debtor from offering his collateral properly falling within the scope of the description to other lenders, but not actually given as collateral in the security agreement to which the registration relates. The need to provide some counterbalance and to protect the interest of debtors or persons named as debtors in registered financing statements is addressed in section 52.

2. Section 52(1) places a legal obligation on a registering party who has registered a financing statement relating to a security interest in consumer goods, to discharge the registration not later than one month after completion of performance by the debtor under the security agreement to which it relates. Failure to comply with this requirement may subject the registering party not only to a judgment for actual damages suffered by the person named as debtor (see section 65(2)), but as well deemed damages prescribed by regulation. See section 66(1).

3. Where the collateral described in the financing statement is not consumer goods, there is no obligation on the registering party to discharge its registration unless a demand is made by a person with an interest in the property falling within the collateral description contained in the financing statement. See section 52(2). The primary reason for the difference in approach between situations where consumer goods are involved and where other collateral is involved, is dictated by the difference between secured consumer credit financing, which is characterized generally by a single transaction and specific items of collateral, and inventory financing or equipment financing, where several agreements and different types of non-specific collateral are likely to be involved in the relationship between a secured party and a debtor. Long term, continuing relationships, which are usually associated with inventory and equipment financing, are facilitated by rules which permit a registering party to maintain his registration, even though he may not at any particular point have a security interest in the property of the person named as debtor.

A subsidiary reason for prescribing a different rule where secured consumer credit is involved is that, in most cases, consumers do not have the sophistication to ensure that financing statements registered against their names or property are not unjustifiably maintained in the Registry. Business debtors generally have a better understanding of the system or have access to legal advice. Consequently they are less likely to be victimized by abuse of the flexibility which the registry system affords.

4. It is important to note that the Registry will provide to all registering parties a document containing the details of each registration effected by them. It will be possible to discharge a particular registration simply by sending this document to the Registrar. The discharge will be registered without cost to the registering party. Accordingly, there will be very little cost associated with discharging registrations.

5. Section 52(2) gives to any person with an interest in property, falling within the collateral description of a particular financing statement, not only the right to require discharge of a registration which is not supported by an extant security agreement, but also the power to force the registering party to amend an unjustifiably broad collateral description.

6. Sections 52(3)-(5) supplement the enforcement measures of sections 65 and 66 by providing a mechanism through which a person with an interest in property falling within the collateral description contained in a financing statement can have the registration discharged. The system is patterned after the "notice to lapse caveat" system of the Land Titles Act. See also section 49(7) of the Bill. It gives the person making the demand under section 52(2) the power to force the registering party to show cause in court while his registration should not lapse. Failure on the part of the registering party to obtain a court order maintaining the registration results in automatic lapse of the registration.

7. Sections 52(6) and (7) prescribe a different system where the registered financing statement indicates that it relates to a trust indenture. As to the definition of "trust indenture", see section 1(1)(y). Discharge of a registration relating to a trust indenture can be forced only through application to a court. The reason for the differential treatment of trust indentures is the fear that a notice to lapse could be overlooked or ignored by a trustee and the security interest might be lost. Because of the large sums involved and the possibility that many small investors may have interests in the debenture, a more controlled procedure for forced discharge is appropriate.

Assignment of interest

53(1) If a financing statement is registered and the secured party has assigned his interest, a financing change statement in the prescribed form may be registered.

(2) If a part of the collateral is assigned, the financing change statement shall so indicate and shall contain a description of the assigned collateral in the prescribed manner.

(3) If no financing statement has been registered with respect to a security interest and the secured party has assigned his interest, a financing statement may be registered in which the assignee is disclosed as the secured party.

(4) After disclosure of an assignment or registration of a financing change statement under this section, the assignee is the secured party.

(5) A financing statement disclosing an assignment may be registered before or after an agreement to assign the security interest has been completed.

COMMENT:

This section provides for assignment of an interest by a secured party whereby the assignee becomes the secured party.

Subordinated interest

54 If a secured party has subordinated his interest to the interest of another person, a financing change statement may be registered at any time during the period that the registration of the subordinated interest is effective.

COMMENT:

This section allows for subordination of a security interest by a secured party to the interest of another person.

If debtor transfers interest in collateral

55(1) If a security interest has been perfected by registration and the debtor transfers his interest in collateral or part of the collateral with the consent of the secured party, the security interest is unperfected as against any interest in the transferred collateral arising subsequent to the transfer unless the secured party registers a financing change statement amending the original financing statement not later than 15 days after the date of the transfer or otherwise perfects the security interest.

(2) Where a security interest is perfected by registration and the secured party learns that

(a) the debtor has transferred all or part of the debtor's interest in all or part of the collateral, or

(b) the name of the debtor has changed,

the security interest in the collateral transferred, where clause (a) applies, or in the collateral, where clause (b) applies, becomes unperfected 15 days after the secured party learns of

(c) the transfer and the information required to register a financing change statement, or

(d) the change of name and the new name of the debtor,

with respect to interests arising subsequent to the transfer or the change of name, as the case may be, unless the secured party registers a financing change statement or takes possession of the collateral within the 15 days or otherwise perfects the security interest.

(3) This section does not have the effect of unperfecting

(a) a security interest in collateral that is described by serial number in accordance with the regulations and is described by its serial number in a registered financing statement, or

(b) a prior security interest registered under a prior registration law and deemed to be registered under section 76.

(4) Where the debtor's interest in all or part of the collateral is transferred by the debtor without the consent of the secured party and there are 1 or more subsequent transfers of the collateral without the consent of the secured party before the secured party learns of the name of the transferee who has possession of the collateral, the secured party shall be deemed to have complied with subsection (2) if the secured party registers a financing change statement not later than 15 days after learning of the name of the transferee who has possession of the collateral and the information required to register a financing change statement, and the secured party need not register financing change statements with respect to any intermediate transferee.

(5) A security interest that becomes unperfected under subsection (1) or (2) may be perfected again as against subsequent interests arising after perfection under this subsection by the registering of a financing change statement or as may otherwise be provided in this Act.

COMMENT:

1. In order to preserve the integrity and usefulness of the registry system, it is necessary to make provision for a situation in which the debtor has changed his name, or in which the debtor has transferred all or part of his interest in collateral to a third party after a financing statement has been registered. Unless the new state of affairs existing after the name change or transfer of collateral is reflected in the Registry, persons who obtain search results may be deceived.

One difficulty endemic to situations described in the preceding paragraph is that the name change or collateral transfer may occur without the knowledge of the registering party. Of course, he cannot be expected to do the impossible: register a financing change statement to reflect a new state of affairs of which he has no knowledge. Accordingly, it is necessary to arrive at a compromise position which provides some, but not complete, protection for persons relying on the Registry and which place obligations, although not impossible obligations, on the registering party. Section 55 embodies this compromise.

2. Section 55(1) requires correction of the registry records in cases where the secured party consents to, and is therefore obviously aware of, the transfer by the debtor of his interest in all or part of the collateral. The secured party is given a period of 15 days from the date of the transfer to register a financing change statement so as to ensure that the registry records reflect the fact that a new debtor is involved. Note that the 15 day period is conditionally provided. Failure to comply with the section requirements results in the security interest being treated as unperfected as of the date of the transfer as against subsequently acquired interests in the collateral. It should be noted that failure to comply with this section does not subordinate the security interest to interests such as other security interests with a subordinate status which arose before the transfer. See also section 33(6). However, as against a person mentioned in section 28(5), compliance with the section during the grace period may not be sufficient to avoid subordination of the security interest.

3. Section 55(2) deals with the situation in which inaccuracies in a registry record result from a change in tht debtor's name or a transfer of all or part of the debtor's interest in the collateral without prior warning to the secured party. The 15 day period for correction of the registry record begins when the secured party learns of the change of name or transfer of collateral.

4. Section 55(3) states exceptions to the requirements of sections 55(1) and (2). The reason for the requirement that the record be corrected is to avoid deception of persons who rely on search results obtained from the Registry. If, however, there is little likelihood that deception will occur after the change of name or transfer of collateral, the need to correct the registry record is not so great. This is the case where the collateral is described by serial number on the financing statement. If the existence of the security interest can be discovered through a serial number search, the fact that it could not be discovered through a search based on the debtor's name does not rob the system of its efficacy.

The other exception to the operation of sections 55(1) and (2) relates to security interests which were registered under prior law and which are deemed registered in the Registry by virtue of section 76(2). Prior law did not require correction of the registry record. Since the prior registration is deemed to be maintained, it is maintained in its entirety, even in its deficient form. While this exception does affect the reliability of information in the Registry, its effect is tolerable only because it will be temporary.

5. Section 55(4) provides some amplification of section 55(2) in a situation where there have been two or more successive transfers of the debtor's interest in the collateral. The operation of the section is illustrated in the following scenario. SP takes and perfects by registration a security interest in a specified item of B's property. Thereafter, B sells the item to C, who, in turn sells it to D who, in turn sells it to E. In the absence of section 55(4), section 55(2) would appear to dictate that once SP learns of the transfers, he must register three separate financing statements each reflecting one stage of the progression of transfers from B to E. Clearly, there is little value in requiring SP to do this. Accordingly, section 55(4) deems compliance with section 55(2) if SP registers within the period prescribed the required financing change statement indicating E as the debtor.

PART 5
RIGHTS AND REMEDIES ON DEFAULT

Application of Part

56(1) Unless otherwise provided in this Part, this Part applies only to a security interest that secures payment or performance of an obligation.

(2) The rights and remedies mentioned in this Part are cumulative.

(3) Subject to any other Act or rule of law to the contrary, where a security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both real and personal property, in which case this Part applies as to the personal property only to the extent that is not inconsistent with laws applicable to proceedings against real and personal property in a single action.

(4) A security interest does not merge merely because a secured party has reduced his claim to judgment.

(5) Where the debtor is in default under a security agreement, the secured party has, in addition to any other rights and remedies, the rights and remedies provided in the security agreement except as limited by section 57(5), the rights and remedies provided in this Part and, when in possession, the rights, remedies and duties provided in section 16.

COMMENT:

1. Part 5 defines the rights of secured parties in the event of default by the debtor. The rights of secured parties are set out as are the limitations on the exercise of those rights which for public policy reasons protect defaulting debtors and other creditors. Default is defined very broadly under the Act (see section 1(f.1)) but a secured party cannot by his security agreement accord himself a discretionary power to demand repayment or performance when he deems himself insecure. See section 15.

2. Part 5 of the Act only applies to security interests that secure payment or performance of an obligation and thus do not apply to non-security leases, outright sales of accounts or chattel paper and non-security consignments. See section 1(v). It should be noted that section 65(1) applies to this Part to the extent that all rights, duties or obligations under this part must be exercised in good faith and in a commercially reasonable manner.

3. Section 56(3) provides an option whereby in the case where a security agreement covers both real and personal property, on default, a secured party is permitted to proceed under Part 5 as to the personal property. He may also proceed as against both real and personal property in which case Part 5 applies to the personal property only to the extent that it does not conflict with any laws applicable to proceedings against real and personal property in a single action.

4. Section 56(4) provides that merely because a secured party has obtained a judgment based upon the underlying debt, a secured party is not precluded from pursuing his in rem rights.

5. Section 56(5) makes it clear that subject to section 75 and section 16, a secured party may by agreement provide for additional rights upon default.

Receiver or receiver-manager

57(1) A security agreement may provide for the appointment of a receiver or a receiver-manager and, except as provided in this Act, prescribe his rights and duties.

(2) On the application of any person entitled to make an application under section 64 and after notice has been given to any person that the court directs, a court may

(a) appoint a receiver or receiver-manager;

(b) remove, replace or discharge a receiver or receiver-manager whether appointed by a court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver or receiver-manager;

(d) approve the accounts and fix the remuneration of a receiver or receiver-manager;

(e) make any order it thinks fit in the exercise of the jurisdiction of the court over receivers or receiver-managers;

(f) make an order requiring a receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody, management or disposition of the collateral of the debtor or to relieve such person from any default on such terms as the court thinks fit, and to confirm any act of the receiver or receiver-manager.

(3) Unless a court orders otherwise,

(a) a receiver-manager is required to comply with sections 16, 60 and 61 only when he disposes of collateral other than in the course of carrying on the business of the debtor, and

(b) sections 59(2), 62 and 63(1)(b) do not apply when a receiver or receiver-manager has been appointed.

(4) Where the debtor is in default under a security agreement, he has, in addition to the rights and remedies provided in the security agreement and any other rights and remedies, the rights and remedies provided in this Part and in section 16.

(5) Except as provided in sections 16, 62 and 63, no provision of section 16 or sections 59(2) and 60 to 64, to the extent that it gives rights to the debtor or imposes duties on the secured party, shall be waived or varied.

COMMENT:

1. While the Judicature Act, R.S.A. 1980, c. J-1, the Alberta Business Corporations Act, S.A. 1981, c. B-15, ss. 89-96 and the Canada Business Corporations Act, S.C. 1974-75, Chapter C-33, ss. 88-96 all contain provisions dealing with receiverships, the great bulk of equitable receivership law remains uncodified. Sections 57(1)-(3), 60(5), 60(8) and 64 of the Bill do not represent an attempt to change this situation. Nor are they designed to displace existing legislation. Their effect will be to supplement existing equitable and statutory rules relating to receiverships. Where a corporate receivership is involved, the applicable law will come from three sources: the rules of equity, business corporations legislation and the Personal Property Security Act. This will be the case whether the receiver or receiver-manager involved is document appointed or court appointed.

The power to appoint or have a receiver appointed is an important feature of modern business financing. Since Bill 73 is designed to provide a reformulation of much of Alberta personal property security law, it would be anomalous if it did not address some of the issues which arise in the context of the use of receiverships as a method of enforcing security interests.

2. The primary function of sections 89-96 of the Alberta Business Corporations Act and sections 89-96 of the Canada Business Corporations Act is to prescribe standards of conduct and bookkeeping practices for receivers and receiver-managers and to subject all receivers and receiver-managers, not just those appointed by a court, to the supervisory jurisdiction of the courts. In addition they require that certain notices be given to the Registrar of Corporations. However these provisions are, by themselves, inadequate.

There is nothing in the basic structure of a receivership which confines its use to situations where corporate debtors are involved. Accordingly, it is important that legislative measures designed to regulate aspects of receiverships be universally applicable and not, as is currently the law in Alberta, confined to corporate receiverships. Part 5 of Bill 73 applies to all security agreements without regard to whether the debtor is a body corporate, a partnership or a physical person. The Part contains a regulatory scheme designed not only to protect the rights of parties to a security agreement and third parties whose rights are affected by the enforcement of security interests, but in addition to provide guidance to secured parties in the exercise of their rights. A review of case law dealing with the conduct of receiverships reveals a great deal of uncertainty and confusion as

to what the law requires of receivers and receiver-managers. The guidance contained in business corporations legislation is general in nature. While in most cases it is possible to make application to a court for direction, this is an expensive and time consuming procedure. Although a receivership is different in some respects to other methods of enforcing security interests, it is not so different that the regulatory scheme of Part 5 can have no relevance to it.

3. Section 57(1) is declaratory of existing law except to the extent that it refers to the application of Part 5.

4. Section 57(2) generally parallels section 95 of the Alberta Business Corporations Act and section 95 of the Canada Business Corporations Act. There is no direct equivalent to section 57(2)(e) in the business corporations legislation.

5. In analyzing the scope of Part 5 as it applies to receiverships, it is necessary to begin with the assumption that unless a court orders otherwise (see section 64) or unless a specific provision of Part 5 states otherwise, all of the provisions of the Part are applicable to a receivership, even though the debtor is a corporation. See sections 1(1)(s) and 57(1).

Section 57(3) provides a necessary refinement where receiver-managers are involved. For obvious reasons, it exempts receiver-managers who are carrying on the business of the debtor from statutory measures designed to regulate the conduct of a secured creditor when he is proceeding to seize and liquidate collateral other than in the ordinary course of business. Section 57(3)(b) exempts receiverships from the operation of section 59(2) which invokes the Seizures Act system for the seizure of collateral. In addition it makes the foreclosure absolute system of section 62 inapplicable and withholds the rights of reinstatement provided in section 63(1) in cases where receiver or receiver-manager has been appointed.

6. This section of Part 5 has been designed specifically to accommodate receiverships, therefore sections 60(5) and 60(7) prescribe notice requirements which are different from those applicable in situations where a receivership is not involved.

7. It is important to note that the requirements of Part 5 can be modified or waived by a court under section 64. Accordingly, the flexibility which characterizes existing law applicable to receiverships has not been removed.

Collection rights of secured party

58(1) Where so agreed and in any event on default under a security agreement, a secured party is entitled

(a) to notify any debtor on an intangible or chattel paper or any obligor on an instrument to make payment to him whether or not the assignor was making collections on the collateral before the notification, and

(b) to take control of any proceeds to which he is entitled under section 26.

(2) A secured party who by agreement is entitled to charge back the uncollected collateral or otherwise entitled to full or limited recourse against the debtor and who undertakes to collect from the debtors on intangibles or chattel paper or obligors on instruments may deduct his reasonable expenses of realization from the collections.

COMMENT:

Many of the complexities associated with the realization of tangible property such as questions of redemption and valuation do not exist with respect to intangibles, chattel paper, securities or instruments. This section therefore provides that a secured party may proceed to collect directly from the debtor or obligor under an intangible, chattel paper, a security or an instrument and to take control of any proceeds that he is entitled to under section 26. However, if proceeds take the form of tangible personal property the regular rules with respect to realization on that form of collateral will apply.

Right of secured party to enforce, etc., on default

59(1) Subject to sections 34 and 35, on default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to enforce the security agreement by any method permitted by law,

(b) if the collateral is equipment and the security interest has been perfected by registration, the equipment may be rendered unusable by the sheriff without removal of it from the debtor's premises, and the sheriff is thereupon deemed to have seized the equipment,

(c) if the collateral is or includes documents of title, the secured party may proceed either as to the documents of title or as to the goods covered by them, and any method of enforcement that is available with respect to the documents of title is also available, with all the necessary modifications, with respect to the goods covered by them, and

(d) collateral may be disposed of under section 60 on the debtor's premises.

(2) For the purposes of enforcing a security agreement, sections 16, 17, 18, 22, 23, 24, 25 except with respect to the notice of objection, 26(1), 38, 40, 43 and 47 of the *Seizures Act* apply, except that in those sections

(a) a reference to "goods", "chattels" or "property" is deemed to be a reference to "collateral",

(b) a reference to "creditor" is deemed to be a reference to "secured party", and

(c) a reference to "power of distress" or "distress" is deemed to be a reference to the right of a secured party to enforce a security agreement under this Part.

(3) Nothing in the sections of the *Seizures Act* referred to in subsection (2) affects the rights of persons who under this Act or other law are given priority over interests of secured parties who authorized seizures of the collateral.

COMMENT:

1. This section makes it an implied term of every security agreement that on default a secured party has a right to enforce the security agreement. Note however the provisions of section 87 of the Act concerning the realization of purchase money security interests in consumer goods. That section continues the seize or sue provisions of the Law of Property Act.

2. Section 59(1) recognizes that often it is too expensive or impractical to remove heavy equipment. A sheriff may therefore simply render it unusable for a seizure to take place.

3. Note that this section is made subject to the provisions of the Act concerning fixtures and accessions which allow a person who has a registered interest in the Land Titles Office an opportunity to pay any amount outstanding to retain the fixtures or accessions. See sections 34(9)-(12) and 35(9)-(12).

4. Section 59(2) of the Act preserves some of the important features of the present Seizures Act. In general, seizure of the collateral would be in accordance with the pre-act law except for one major difference. Instead of providing for a Notice of Objection, a debtor would under the Act receive the protection of the provisions of a Notice of Disposition set out in section 60 and a right to apply to the court for relief under section 64. In addition, the Act in section 63 specifically allows for redemption or reinstatement by the debtor and prescribes certain protections to a debtor under section 62 if the secured party proposes to retain the collateral rather than have it sold in the normal manner.

5. Section 59(3) makes it clear that mere seizure by the sheriff under instructions by the secured party does not elevate the secured party to a better position over other persons who had priority over the secured party who authorized the seizure. It preserves the relative priority position of the parties.

Disposal of collateral on default

60(1) Collateral may be disposed of in its condition in accordance with this Part either before or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied in the following order to

(a) the reasonable expenses of enforcing the security agreement, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the party requesting the disposition,

and the surplus, if any, shall be dealt with in accordance with section 61.

(2) Collateral may be disposed of

(a) by public or private sale;

(b) at any commercially reasonable time of day or place;

(c) as a whole or in commercial units or parts;

(d) if the security agreement so provides, by lease or by deferred payment.

(3) Disposition of the collateral in whole or in part may be delayed for any period of time that is commercially reasonable.

(4) Not less than 20 days prior to disposition of the collateral, the secured party shall serve a notice on

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral,

(b) any creditor or person with a security interest in the collateral

(i) whose interest is subordinate to that of the secured party,

(ii) who has registered a financing statement in the name of the debtor or according to the serial number of the collateral when it is required for registration, and

(iii) whose interest was perfected by possession at the time the collateral was seized,

(c) any other person with an interest in the collateral who has delivered a written notice to the secured party of his interest in the collateral prior to the date that the notice is served on the debtor, and

(d) the sheriff.

(5) A receiver or receiver-manager appointed by a court or pursuant to a security agreement shall serve notice of his intention to dispose of the collateral on

(a) the debtor, and where the debtor is a corporation, on a director of the corporation,

(b) any other person who is known by the secured party to be the owner of the collateral,

(c) any person mentioned in subsection (4)(b), and

(d) any other person with an interest in the collateral who has delivered a written notice to the secured party of his interest in the collateral prior to its disposition.

(6) The notice mentioned in subsection (4) shall contain

(a) a description by item of the collateral sufficient to enable it to be identified,

(b) the amount required to satisfy the obligations secured by the security interest,

(c) the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, and a brief description of any other provision of the security agreement for the breach of which the secured party intends to dispose of the collateral,

(d) the amount of the applicable expenses mentioned in subsection (1)(a) or, where the amount of such expenses has not been determined, a reasonable estimate,

(e) a statement that, on payment of the amounts due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral,

(f) a statement that, on payment of the sums actually in arrears or the curing of any other default, as the case may be, together with payment of the amounts due under subsection (1)(a), the debtor may reinstate the security agreement,

(g) a statement that, unless the collateral is redeemed or the security agreement is reinstated, the collateral will be disposed of and the debtor may be liable for any deficiency, and

(h) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(7) The notice mentioned in subsection (5) shall contain

(a) a description of the collateral by type, and

(b) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(8) Where the notice required in subsection (4) is served on any person other than the debtor, it need not contain the information specified in subsection (6)(c), (f) and (g), and, where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in subsection (6)(c), (f) and (g).

(9) No statement mentioned in subsection (6)(g) shall make reference to any liability on the part of the debtor to pay a deficiency if under any Act or rule of law the secured party does not have the right to collect a deficiency from the debtor.

(10) The notice required in subsection (4) or (5) may be served in accordance with section 70 or, in the case of service on the person who has registered a financing statement, by registered mail addressed to the address of the person to be served as it appears on the financing statement.

(11) The secured party may purchase the collateral or any part of it only at a public sale and only for a price that bears a reasonable relationship to market value.

(12) When collateral is disposed of by sale to a bona fide purchaser for value who takes possession of it, the purchaser acquires the collateral free from the interests of the debtor and from any interest subordinate to that of the secured party, whether or not the requirements of this section and the sections of the *Seizures Act* referred to in section 59(2) have been complied with, and all obligations secured by such subordinate interests are deemed to be performed for the purposes of section 52.

(13) Subsection (12) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 76 who has not been given a written notice under this section.

(14) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or receiver or receiver-manager or is subrogated to the rights of the secured party has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

(15) The notice mentioned in subsection (4) or (5) is not required where

(a) the collateral is perishable;

(b) the collateral will decline substantially in value if not disposed of immediately after default;

(c) the cost of care and storage of the collateral is disproportionately large relative to its value;

(d) for any other reason, a court, on an ex parte application, is satisfied that a notice is not required;

(e) after default, every person entitled to receive a notice of disposition under subsection (4) consents in writing to the immediate disposition of the collateral.

COMMENT:

1. The right of disposition of tangible collateral is accorded to a secured party subject to the recognition of interests of the debtor and subordinate secured parties. The Act recognizes that the collateral may require repairing, processing or preparation for purposes of a sale and reasonable expenses incurred by the secured party in that regard are provided for. (see subsection (1))

2. A much more flexible approach to disposition than is presently the case under the Seizures Act is contemplated by subsection 2. For example, there would be no need to obtain a court order to dispose of collateral by private sale. However see section 60(11) for restrictions on the sale of collateral to the secured party.

3. In lieu of a Notice of Objection that is currently available under the Seizures Act, section 60(4) requires a Notice of Disposition to a debtor at least 20 days prior to the disposition. In addition, to accommodate the interests of perfected subordinate interests who after disposition would lose their interests in the collateral, a similar notice (except for certain specific items in the notice that really relate ony to the debtor) must be served on them by the secured party. This notice accords them the opportunity to make an appropriate application under section 64 to oppose the disposition or to pay out the primary secured party. A similar notice is required to be served by a receiver or receiver-manager but containing significantly less detail.

4. In most cases the debtor will be liable for any deficiency on a sale of collateral. However see section 87. It is, however, the policy of the Act to only allow purchase of the collateral by a secured party at a public sale and only at a price that bears some resemblance to market value to ensure that the best possible price is achieved.

5. Unlike section 36 of the Seizures Act, section 60(12) makes it clear that a bona fide purchaser for value in possession takes free from the interests of a debtor, including a transferee from the debtor, as well as subordinate interests to the secured party authorizing the disposition. The Act as a matter of policy favours a bona fide purchaser and hence such a person may take free of the interest of the debtor whether or not the requirements of this part concerning disposition have been complied with. This would allow collateral to be more attractive to potential purchasers and thus more valuable in the market place.

6. Section 60(15) recognizes that if collateral is perishable or of a kind that declines in value rapidly, it would not be desirable to require a secured party or a receiver or receiver-manager to meet the notice requirements of section 60(4) or 60(5). The storage or other costs would generally be disproportionate to the value of the collateral.

Application of surplus

61(1) Where a security agreement secures an indebtedness and the collateral has been dealt with under section 58 or has been disposed of in accordance with section 60 or otherwise, any surplus shall unless otherwise provided by law or by the agreement of all interested persons be accounted for and paid in the following order to

(a) a person who has a subordinate security interest in the collateral

(i) who registers a financing statement indexed in the name of the debtor or according to the serial number of the collateral, when it is required for registration, prior to the distribution of the proceeds, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person who has an interest in the surplus, if that person has delivered a written demand therefor on the secured party prior to distribution of the proceeds, and

(c) the debtor or any other person who is known by the secured party to be the owner of the collateral.

(2) The secured party may request a person who has a subordinate security interest or a person who has delivered a written demand to furnish him with proof of that person's interest, and, unless the person furnishes such proof not later than 10 days after the secured party's demand, the secured party need not pay over any portion of the surplus to him.

(3) Unless otherwise agreed, or unless otherwise provided in any Act, the debtor is liable for any deficiency.

COMMENT:

This section provides that any surplus from the disposition of collateral will be paid over: firstly to prior subordinate perfected security interests; secondly to any other persons with an interest in the surplus if a written demand has been delivered to the secured party and lastly to the debtor or owner of the collateral. The debtor unless agreed or otherwise provided in any other Act (see section 87) is liable for any deficiency.

Retention of collateral

62(1) After default, the secured party may propose to retain the collateral in satisfaction of the obligations secured, and shall serve a notice of the proposal on

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral,

(b) any creditor or person who has a security interest in the collateral

(i) whose interest is subordinate to that of the secured party,

(ii) who has registered a financing statement in the name of the debtor or according to the serial number of the collateral when it is required for registration, and

(iii) whose interest was perfected by possession at the time the collateral was seized,

(c) any other person with an interest in the collateral who has delivered a written notice to the secured party of an interest in the collateral prior to the date that notice is served on the debtor, and

(d) the sheriff.

(2) If any person who is entitled to notification under subsection (1) whose interest in the collateral would be adversely affected by the secured party's proposal delivers to the secured party and the sheriff a written objection not later than 15 days after service of the notice, the collateral shall be disposed of in accordance with section 60.

(3) If no objection is made, the secured party is, at the expiration of the 15-day period or periods mentioned in subsection (2), deemed to have irrevocably elected to retain the collateral in full satisfaction of the obligations secured, and thereafter is entitled to hold or dispose of the collateral free from all rights and interests in it of any person entitled to notification under subsection (1)(b) who has been served with such notice and any person entitled to notification under subsection (1)(a) and (c) whose interest is subordinate to that of the secured party and who has been served with such notice.

(4) The notice required under subsection (1) may be served in accordance with section 70 or, in the case of service on a person who has registered a financing statement, by registered mail addressed to the address of the person to be served as it appears on the security agreement or financing statement.

(5) The secured party may require any person who has made an objection to his proposal to furnish him with proof of that person's interest in the collateral and, unless the person furnishes proof not later than 10 days after the secured party's demand, the secured party may proceed as if he had received no objection from that person.

(6) On application by a secured party, and after notice to all persons entitled to notice under subsection (1), a court may determine that an objection to the proposal of a secured party is ineffective on the grounds that

(a) the person made the objection for a purpose other than the protection of his interest in the collateral or the proceeds of a disposition of the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) When collateral is disposed of by sale to a bona fide purchaser for value who takes possession of it, the purchaser acquires the collateral free from the interests of the debtor and from any interests subordinate to that of the secured party, whether or not the requirements of this section have been complied with, and all obligations secured by such subordinate interests are deemed to be performed for the purposes of section 52.

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 76 who has not been given a written notice under this section.

COMMENT:

This section provides that a secured party may propose to retain the collateral provided all interested parties consent. If one of the interested parties objects under subsection 2 then the normal disposition provisions of section 60 apply. By this section the secured party accepts the collateral thereby discharging the debt and abandoning any claim for a deficiency. This recognizes that in some cases it will be more advantageous for a secured party to retain the collateral rather than proceed with a resale.

Redemption of collateral

63(1) At any time before the collateral has been disposed of or disposal has been contracted for under section 60 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 62,

(a) any person entitled to receive a notice of disposition under section 60(4) or (5) may, unless he has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral, or

(b) the debtor other than a guarantor may, unless he has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, and by curing any other default by reason whereof the secured party intends to dispose of the collateral,

together with payment of a sum equal to the reasonable expenses of retaking, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of 1 year after the day value was given by the secured party.

COMMENT:

To the extent that a debtor's interest has not been extinguished, a debtor or other interested person is entitled to reinstate the security agreement and thereby avoid the operation of an acceleration clause. In order to prevent abuse of these provisions, a debtor is restricted in the number of times that he may exercise his right.

Application to court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, any person who has an interest in collateral which may be affected by an order under this section or a receiver or a receiver-manager, whether appointed by a court or pursuant to a security agreement and after notice has been given to any person that the court directs, a court may

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with this Part or sections 16, 34 and 35,

(b) give directions to any person regarding the exercise of his rights or discharge of his obligations under this Part or sections 16, 34 and 35,

(c) relieve any person from compliance with the requirements of this Part or sections 16, 34 and 35 but only on terms that are just and reasonable for all parties concerned,

(d) stay enforcement of rights provided in this Part or sections 16, 34 and 35 under any terms and conditions that the judge, in his discretion, considers just and reasonable, or

(e) make any order necessary to ensure protection of the interests of any person in the collateral.

COMMENT:

This section allows for applications to the court by the debtor as well as other interested persons in relation to the exercise of default rights and remedies and some of the other provisions of the Act that are similar in nature. The court is given extensive powers to deal with difficulties that may occur as a result of the operation of Part 5.

PART 6
MISCELLANEOUS

Proper exercise of rights, duties and obligations

65(1) All rights, duties or obligations arising under a security agreement under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) If a person fails to discharge any duties or obligations imposed upon him by this Act, any person has a right to recover loss or damage that he suffered and that was reasonably foreseeable as likely to result from the failure.

(3) Except as otherwise provided in this Act, any provision of any agreement which purports to exclude any duty imposed or to limit the liability of a person for failure to discharge duties imposed upon him by this Act is void.

(4) In assessing damages under this Act, the Court may consider as a mitigating factor evidence that the defendant employed reasonable diligence and took all reasonable precautions to discharge the duties and obligations imposed on him by this Act.

(5) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply.

COMMENT:

1. Section 65(1) states the standard of conduct applicable to the exercise of rights and the discharge of obligations prescribed by the Bill or contained in security agreements. The statutory standards of good faith and commercial reasonableness can be found elsewhere in Alberta legislation. See Business Corporations Act S.A. 1981, c. B-15, s. 94.

The mention of "reasonable" or "commercial reasonableness" in other sections of the Bill (see, for example, sections 16, 59(2)(b), 59(3) and 64) should not be viewed as indicating that the standard prescribed by section 65(1) is not of general application.

2. Sections 65(2)-(4) provide a remedy and prescribe the measure of compensation in cases where the requirements of the Bill, including those of section 65(1), have not been met. Other sections provide different remedies in specific circumstances. See sections 10, 17(4), 17(5), 17(7), 46, 52(7), 63, 66, 67 and 68.

3. While the Bill does not specifically so provide, it should be assumed that since the Bill provides a wide range of appropriate remedies, the judicially created principle of conditional sales law that non-compliance with statutory seizure and sale requirements results in loss of a right to recover deficiency, is rejected.

4. The measure of damages recoverable under section 65(2) is that applicable to breaches of contracts. However, section 65(4) gives power to a court to reduce the amount recoverable in a case where conduct complained of was not the product of an intentional or negligent disregard of the statutory duties or obligations.

5. Section 65(3) proscribes contractual exclusion or waiver of rights, duties or remedies set out in the Bill.

6. Section 65(5) embodies the recognition that the Bill is not a complete, self-contained code of law applicable to personal property security transactions. It draws upon other related areas of law in order to fill the gaps in the system and to provide a basic foundation for relationships with which the legislation deals. The most obvious example of incorporation by reference is found in the context of security agreements. Since the Bill contains only a few specific provisions relating to security agreements, the law of contract provides the basic infrastructure for regulation of the rights of parties to a security agreement.

It should not be assumed, however, that section 65(5) gives licence to the court to import into the system contemplated by the Bill concepts such as equitable title or floating charges.

Deemed damages

66(1) In any case where a secured party, without reasonable excuse, fails to comply with obligations

(a) in section 52, or

(b) in sections 16, 17, 60 or 62 and the collateral is consumer goods,

the debtor shall be deemed to have suffered damages not less than the amount prescribed.

(2) The onus of establishing reasonable excuse is on the secured party.

COMMENT:

This section in effect provides for punitive damages in cases of inexcusable non-compliance with section 52 in all cases, or with sections 16, 17, 60 or 62 in cases where collateral involved is consumer goods. The policy underlying the section is that persons affected by non-compliance with these sections should not be required to establish that they have suffered a quantifiable loss. Often they are unable to establish damages in a technical legal sense, but nevertheless have suffered great inconvenience. The balance of fairness and convenience, of which the enumerated sections are an important part, should not be disturbed by a secured party who might otherwise conclude that the inability on the part of persons affected to prove actual or substantial damage resulting from his non-compliance, insulates him from responsibility. Absolute compliance, however, is not demanded. Only reasonable efforts are expected.

Order of the Court

67 On application of any interested person referred to in section 64, and after notice has been given to any person that the Court directs, the Court may

(a) make any order necessary to determine questions of priority or entitlement in or to collateral,

(b) direct an action to be brought or an issue to be tried, or

(c) make an order as to the costs of the proceedings as it considers just.

COMMENT:

This section, while purely procedural, has great practical significance. It allows summary determination of priority disputes or resolution of conflicting claims to collateral in cases where the circumstances do not warrant a trial.

Extension of time

68 Where in this Act, other than in sections 5, 6, 7 and 12, Parts 3 and 4 and this Part, a time is prescribed not later than which or before which any act or thing must be done, the Court, on application before or after the time has expired, may extend or abridge the time for compliance on any terms that it considers just and reasonable.

COMMENT:

It is important to note that the power given by this section to extend or abridge periods of time for taking steps as prescribed or permitted by the Bill does not extend to time periods set out in the enumerated sections. In fact, the section has a very narrow scope. For examples of situations in which it might be invoked, see sections 10, 60(4), 61(2), 62(3) and 62(5).

Errors and omissions

69(1) The validity or effectiveness of a financing statement or notice registered under section 49 is not affected by reason of a defect, irregularity, omission or error in the statement or notice or in the execution or registration of the statement or notice unless the defect, irregularity, omission or error is seriously misleading.

(2) Failure to provide a description in a financing statement or a notice under section 49 or the regulations in relation to any type or item of collateral does not affect the validity or effectiveness of the financing statement in respect of any other collateral.

COMMENT:

1. Section 69(1) embodies the recognition that error is endemic to any system which involves human activities. Compliance with the registration requirements of the Personal Property Registry will be far less than perfect in many cases. Accordingly, some accommodation for human weakness is required. Of course, too much tolerance of non-compliance would threaten, if not destroy, the efficacy of the registry system. Section 69 embodies an attempt to prescribe a rule which identifies that amount of non-compliance which can be tolerated without threatening the system. A defect, irregularity, omission or error in a registration document has no effect on the validity or effectiveness of the document unless it is "seriously misleading".

2. It will be immediately obvious that "seriously misleading" like "big" or "small" is a relative concept which can be usefully employed only when the context within which it functions is determined. Ultimately, it will be left to the courts to decide in the context of particular cases whether or not non-compliance is seriously misleading. It should not be assumed, however, that the test of section 69(1) is subjective. There is no requirement, as there is under section 25 of the Bills of Sale Act R.S.A. 1980, c. B-5, that anyone be actually misled. The proof of this contention is found in the fact that, in some situations, priority over an unperfected security interest does not depend upon the presence or absence of notice of the security interest. For example, if proof that a person claiming priority was actually misled is a feature of section 69(1), a security interest to which a defective financing statement relates could never be invoked by a trustee in bankruptcy under section 19(1)(b). A trustee is never misled; his status comes from the fact of bankruptcy only.

The test of section 69(1) is an objective one. In any particular case the court must determine whether or not the non-compliance in question is of a kind that threatens the efficacy of the system because uses of it would obtain misleading information on search results. It would be a mistake to assume that the test of section 69(1) is an easy one to apply or that the outcome of its application is readily predictable.

3. The application of section 69(1) will be affected significantly by the computer system of the Personal Property Registry. This system is designed to disclose not only names and serial numbers which are exact matches to the search criterion used by the searching party, but will disclose as well close similar matches. Accordingly, if a registering party has made an error in recording the debtor's name or serial number of the goods on his financing statement, it does not follow that his registration will not be disclosed to a searching party who obtains a search result using the debtor's correct name or the correct serial number of the collateral as his search criterion. This registration will not be disclosed as an exact match, but, depending upon the nature and extent of the differences between the registration criterion and the search criterion, the registration may be revealed as a close similar match. If it is disclosed as such, and other related information, including the debtor's address and birthday, would lead a reasonable person to conclude that the registration may well refer to the person with whom he is dealing. In such a case the non-compliance registration may not be seriously misleading and therefore legally effective.

Service of notices

70(1) If under this Act a notice or any writing may be or is required to be served, it may be served on

(a) an individual, by delivery or by registered mail addressed to him at his residence or place of business and, if he has more than 1 place of business, at any one of his places of business;

(b) a partnership,

(i) by delivery to

(A) any one or more of the general partners, or

(B) any person having, at the time of service, control or management of the partnership business at the principal place of business of the partnership within the Province, or

(ii) by registered mail addressed to

(A) the partnership,

(B) any one or more of the partners,

(C) any person having, at the time of delivery, control or management of the partnership business

at the address of a place of business of the partnership;

(c) a corporation

(i) by delivery to an officer or director of the corporation or the manager or person in charge of a place where the corporation carries on business,

(ii) by registered mail addressed to the registered or head office of the corporation or to any place where it carries on business, or

(iii) where the corporation has its registered or head office outside Alberta and it carries on business in Alberta, by registered mail addressed to the attorney for the corporation appointed under Part 21 of the *Business Corporations Act*.

(2) Service by registered mail is effected when the addressee actually receives the notice or writing or on the expiry of 4 days after the day of registration, whichever is earlier.

(3) If a notice or writing may be served by registered mail to the address as it appears on a registered financing statement or security agreement and

(a) no financing statement was required to be registered and no sufficient address appears on the security agreement, or

(b) no writing is registered and the security interest is deemed to be perfected under section 76(5),

the notice or writing shall be served in accordance with subsection (1).

COMMENT:

1. This section provides guidance to parties who are instructed or required by various provisions of the Bill to serve notices. See sections 17(1)-(2), 32(1)(b), 34(10)-(11), 35(10)-(11), 52(2), 52(4), 60(4), 60(10), 62(1) and 62(4). This section does not provide the only source of rules applicable to service. Where court applications are involved, the court may direct service in an alternative form. See sections 9(2), 16(4), 17(4), 17(5), 57(2), 62(6), 64 and 67. Further, the requirements of section 70 are supplemented in some situations. See sections 17(2), 34(11), 35(11), 52(4), 60(10) and 62(4).

2. It should be noted that service of notices on a corporation need not be at a place in Alberta. It can be sent by registered mail to any place where the corporation carries on business.

3. Section 70(2) states a presumption of delivery where registered mail is used. This avoids difficult problems of proof of service.

4. Section 70(3) is designed to qualify sections 70(2), 34(11), 52(4), 60(10) and 62(4).

Deemed notice

71 For the purposes of this Act, a person knows or has notice when

(a) in the case of an individual, information comes to his attention under circumstances in which a reasonable person would take cognizance of it,

(b) in the case of a partnership, information has come to the attention of one or more of the general partners or of a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it, and

(c) in the case of a corporation, information has come to the attention of

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it, or when the information in writing has been delivered to the registered office of the corporation or attorney for an extra-provincial corporation appointed under Part 21 of the *Business Corporations Act*.

COMMENT:

1. Several sections of the Bill make reference to "knowledge" or "notice". See sections 5(2), 19(1), 28, 29 and 33(4). In the past, courts have had a great deal of difficulty in defining and applying these terms. Section 71 is designed to provide guidelines which reduce the uncertainty associated with the application of the above-noted sections.

2. The basic test of the section is objective. While it is clear that the test does not involve the concept of constructive notice, it is also clear that a person may be deemed to have notice under this section even though information made available to him did not register in his mind. The test focuses on the reasonable person.

The circumstances in which the information is communicated are important aspects of the test. For example, if information is conveyed casually to or is overheard by a person at a cocktail party, presumably this information would not have been conveyed under circumstances in which a reasonable person would take cognizance of it.

3. Sections 71(b) and (c) refine the test for application in the context of a partnership and a corporation. Accordingly, communication to an employee of a corporation is not communication to the corporation unless the employee is senior and has responsibility for matters to which the information relates. However, delivery of written information to the registered office of a corporation amounts to effective legal communication of it regardless of the status or responsibilities of the person who receives it.

Appeals

72 An appeal lies to the Court of Appeal from an order, judgment or decision of the Court.

Conflict between Act and other legislation

73(1) If there is a conflict between a provision of this Act and a provision of any Act for the protection of consumers, the provision of that Act prevails.

(2) Except as otherwise provided in this or any other Act, if there is a conflict between a provision of this Act and a provision of any general or special Act other than those mentioned in subsection (1), the provision of this Act prevails.

COMMENT:

1. Section 73 gives supremacy to consumer protection legislation in the event of conflict between the provision of the Bill and a provision of such legislation. There are few situations in which such a conflict is likely to occur. The most obvious one has been addressed by specific provisions of the Bill. See sections 61(3) and 87(amending the Law of Property Act, section 49).

2. Since the system of law embodied in the Bill is designed to re-define basic personal property security law in Alberta, its provisions must prevail over conflicting provisions of other Acts. It is expected, however, that such conflicts will be few.

References

74(1) A reference in an Act, regulation, writing or other thing to the Assignment of Book Debts Act, the Bills of Sale Act, the Business Corporations Act, the Chattel Security Registries Act or the Conditional Sales Act that relates to a security interest in personal property or fixtures is deemed to be a reference to this Act or to the corresponding provisions of this Act.

(2) A reference in any Act to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge or assignment of book debts, or any derivative of those terms, or to any transaction which under this Act is a security agreement, is deemed to be a reference to the corresponding kind of security agreement under this Act.

Transitional application of Act

75*(1) In this section and section 76, "prior law" means the law in force immediately before the coming into force of this Act.*

(2) This Act applies

(a) to every security agreement made after this Act comes into force, and

(b) subject to subsections (3), (4) and (5), to every prior security interest as defined in section 76 that is not validly terminated, completed, consummated or enforced in accordance with the prior law before this Act comes into force.

(3) The validity of a prior security interest as defined in section 76 is governed by the prior law.

(4) The order of priorities

(a) between security interests is determined by the prior law, if all of the competing security interests arose under security agreements entered into before this Act comes into force, and

(b) between a security interest and the interest of a third party is determined by the prior law, if the third party interest arose before this Act comes into force and the security interest arose under a security agreement entered into before this Act comes into force.

(5) This Act applies to security interests created under

(a) renewal, extension, refinancing or consolidation agreements made after this Act comes into force, and

(b) revolving credit transactions entered into before and continuing after this Act comes into force.

COMMENT:

1. A very difficult, although temporary, issue necessarily associated with the enactment of reform legislation which affects contractual or proprietary rights is whether or not the new legislation is to affect rights existing at the date of implementation. In the context of personal property security law, two categories of rights are involved: the inter partes rights of secured parties and debtors, and the rights of secured parties vis-a-vis other persons who have existing or potential claims to the collateral.

Since the decision to lend money or to grant credit on a secured basis necessarily entails an assessment by the secured party of the risks involved, it may be unfair to make new legislation applicable to existing contracts, since this would involve changing the rules in the middle of the game thereby exposing the secured party to new risks and obligations. Balanced against this important consideration is the great potential for confusion which would be created when two different systems of law function side by side.

2. The type of problem which can arise in the context of competing security interests is illustrated in the following scenario. Assume that prior to implementation of Bill 73, SP I takes a chattel mortgage on D's existing and after-acquired personal property to secure an advance. This mortgage is properly and effectively registered as required by the Bills of Sale Act. Before SP I is totally repaid, but after the new legislation is proclaimed, D acquires new chattels with a loan obtained from SP II. SP II is aware of SP I's mortgage. SP II perfects his security interest as required by the new legislation. SP I has an equitable mortgage on the newly-acquired chattels. SP II has a perfected purchase money security interest in the chattels.

Since SP I's mortgage is equitable, it is subject to a subsequent legal mortgage acquired without notice. Accordingly, if prior law applied to the scenario, SP I would have priority because of SP II's knowledge. However, knowledge is not important under the Bill. What is important is that SP II has a purchase money security interest. See section 32. Is there any reason to prefer SP I over SP II? Both secured parties proceeded on certain assumptions as to what their legal position would be if they were forced to realize on their security.

Bill 73 embodies the conclusion that it is more acceptable from a commercial point of view to require that secured parties in the position of SP I conform to the reformed law rather than to require secured parties in the position of SP II to conform to two legal systems, the old and the new. The number of secured parties in the position of SP I is much smaller than the number of secured parties in the position of SP II. Accordingly, the total amount of inconvenience caused by the change in the law is smaller if SP I is required to conform to the changes.

In the scenario set out in the preceding paragraphs, SP I would not be significantly prejudiced by a change in the law. Since his security interest is equitable only, it is vulnerable under prior law. Accordingly, when entering into the transaction with D, SP I must have known that his mortgage could be defeated by a subsequent legal interest acquired without knowledge. To make SP I subject to SP II adds little to the magnitude to the risk SP I assumed from the beginning. Because of the many uncertainties produced by prior law, there are few situations in which a secured party with a security interest acquired prior to the change in the law would be substantially prejudiced by the change. Indeed, in many situations the position of secured creditors will be enhanced and strengthened. For example, in the scenario, SP I would have under the new legislation automatically perfected his security interest on the newly-acquired chattels. See sections 11 and 12. While under prior law his interest could have been defeated by any subsequent legal interest acquired without actual knowledge, under the system in the Bill it is subject only to a subsequent purchase money security interest and, perhaps, the interest of a purchaser under section 28. The range of interest to which SP I's mortgage is subject under the Act is significantly reduced. Further, the ability of SP I to have a security interest in the proceeds under prior law would have been very limited. Since the Act applies to his mortgage, he is given the right to have a security interest in proceeds as set out in section 26.

3. At first impression it may appear that the application of the Bill to existing non-security leases and non-security consignments will radically alter the rights of lessors and consignors. However, this would be the case only in instances where a lessor or consignor fails to register as required by the Bill. If their interests are registered, their priority status is very similar to their status as owners of the goods under prior law.

4. In the context of inter partes rights, the choice is, perhaps, more obvious. Part 5 embodies rules of law which for many years have been a feature of personal property security law in one context or another. The significance of Part 5 is that it provides a uniform system for all security agreements which are similar in kind. Changes brought about through Part 5 are essentially procedural and will in most cases be of benefit to all parties concerned.

Section 75 embodies the above-noted policy determinations. The Bill applies to any security agreement which exists at the date of implementation of the legislation. The main exception to this principle is that prior law governs priority disputes in cases where the interests of the various claimants arose entirely under prior law.

Security interest prior to the coming into force of this Act

76(1) *In this section,*

(a) "prior security interest" means an interest created, reserved or provided for by a security agreement or other transaction validly created or entered into before this Act comes into force, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was created or entered into;

(b) "prior registration law" means the Assignment of Book Debts Act, the Bills of Sale Act, the Business Corporations Act, the Conditional Sales Act, and the Chattel Security Registries Act as they existed immediately before the coming into force of this Act.

(2) A prior security interest that, when this Act comes into force, is covered by an unexpired filing or registration under a prior registration law is deemed to have been registered and perfected under this Act and, subject to this Act, the filing or registration continues for the unexpired portion of the filing or registration period and the filing or registration, as the case may be, may be further continued by registration of a renewal statement under this Act where the security interest could be perfected by registration if it were to arise after this Act comes into force.

(3) Subject to subsection (4), a prior security interest that, at the time this Act came into force, was covered by an unexpired registration under the Business Corporations Act shall be deemed to have been registered and perfected under this Act.

(4) A registration of a prior security interest referred to in subsection (3) expires 3 years from the date this section came into force, but may be further continued by the registration of a renewal statement under this Act if the security interest could have been perfected by registration if it arose after this Act came into force.

(5) A prior security interest validly created, reserved or provided for under any prior law that gave that interest the status of a perfected security interest without filing or registration under any prior registration law and without the secured party taking possession of the collateral is perfected within the meaning of this Act as of the date the security interest attached, and that perfection continues for 3 years from the day this Act comes into force, after which it becomes unperfected unless otherwise perfected under this Act.

(6) A prior security interest that, when this Act came into force, could have been, but was not

(a) covered by a filing or registration under a prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party,

may, if permitted by this Act, be perfected by registration or possession in accordance with this Act.

(7) A prior security interest that under this Act may be perfected by the secured party's taking possession of the collateral is perfected for the purposes of this Act by such possession, whether the possession occurred before, on or after the date this Act came into force and notwithstanding that the prior law did not permit the perfection of the security interest by such possession.

(8) The perfection of a prior interest that, when this Act came into force, was covered by an unexpired filing or registration under a prior registration law, and for the perfection of which under this Act no taking of possession by the secured party or registration of a financing statement is required in this Province continues under this Act.

(9) A prior security interest that, when this Act came into force, could have been, but was not, covered by a filing or registration under a prior registration law and that, under this Act, may be perfected without registration of a financing statement and without possession of the collateral by the secured party is perfected under this Act if all other conditions for the perfection of the security interest are satisfied.

COMMENT:

1. The system provided in Bill 73 is designed to replace all existing personal property security registry statutes and rules of common law and equity relating to priority status of security interests. However, simple repeal of prior law would result, in many cases, in security agreements created and perfected under prior law ceasing to be perfected under the system provided in the Bill unless they were reperfected in accordance with the rules of the Bill and the Personal Property Registry. The disruption and priority complications which would result if this approach were adopted are unacceptable. Section 76 is designed to provide a system for transition from the perfection systems of prior law to the system contained in the Bill.

2. Section 76(2) provides for the continuation under the Bill of registrations effected under prior registry statutes. A security interest validly registered under a prior registry statute continues as a registered interest under the new system until the expiry of the period of registration prescribed by prior registration law. See section 76(1)(b). However, if the secured party wishes to maintain the perfected status by registration after the expiry of such period, he must comply in every aspect with the requirements of the new system. This will not be difficult to do.

3. The policy of section 76(2) is extended by section 76(3) to registration of security interests under the Business Corporations Act, S.A. 1981, c. B-15, s. 88.1-88.9. However, section 76(4) qualifies its application in this context. Since there is no set duration for registration under the Business Corporations Act, measures are required to bring prior security interests registered under that Act within the scope of the Personal Property Registry so that they are ultimately in the computerized data base of the Registry and are disclosed on searches conducted under section 44 of the Bill. Two approaches to integration of registrations under the Business Corporations Act are available. One is to attempt an integration of the records of the Registrar of Corporations into the Personal Property Registry records. The other is to require holders of prior security interests registered under the Business Corporations Act to re-register under the Personal Property Security Act. Section 76(4) adopts the latter approach.

It should be noted that section 76(4) does not require re-registration of corporation security interests in the Personal Property Registry immediately after the Registry becomes operative. A grace period of three years is given during which holders of these interests can be made aware of the necessity to comply with the new system. One of the consequences of this approach is to make it necessary until the three year period specified in section 76(4) is expired to retain intact and available for public inspection the records of the Registrar of Corporations.

4. Under existing law, certain types of security interests are deemed perfected without registration. For example, an assignment of specific accounts or accounts growing due under specified contracts is perfected without registration. Most leases and all consignments are excused from registration under existing law. However, once the new system is proclaimed, these types of interests must be registered to be perfected. See sections 1(1)(a), 1(1)(d), 1(1)(l.1), 1(1)(v), 3(a), 3(d), 19(1), 22 and 23. While section 76(5) requires the registration of such interests, it provides a grace period of three years after the new system comes into force during which these types of interests are deemed perfected under the Act without registration or possession.

The provision of a grace period by section 76(5) carries with it dangers not associated with the grace period provided in section 76(4). Persons obtaining search results from the Personal Property Registry during the three year period after the system comes into force must realize that the search result will not disclose security interests or deemed security interests which under prior law were given the status of a perfected security interest without registration or possession by the secured party.

5. Section 76(6) provides for first time registration of prior security interests.

6. Section 76(7) relates primarily to perfection by possession where the collateral involved is chattel paper. See section 1(1)(c). Under prior law, a security interest in chattel paper cannot be perfected by registration since chattel paper is not recognized as a separate type of property capable of being possessed.

7. In a few situations, the Bill permits temporary perfection without registration or possession. See sections 5, 24(2), 26(3) and 27(4). Sections 76(8) and 76(9) are designed to facilitate transition from a system under which these types of interests must be registered to the system embodied in the Bill.

Regulations

77 The Lieutenant Governor in Council may make regulations

(a) prescribing a list of goods the lease of which is not covered by this Act by virtue of section 1(1)(l.1)(v);

(b) prescribing the duties of the Registrar;

(c) prescribing business hours for the offices of the Registry or any of them;

(d) respecting the Registry, including the transition from any prior registry systems to the system established under this Act;

(e) requiring the payment of fees and prescribing the amount of them and their manner of payment;

(f) prescribing

(i) the form and contents of financing statements and financing change statements required or permitted to be registered in the Registry under this or any other Act, and the manner of their use, and requiring that those statements used, or any of them, must be those provided by the Registrar, and

(ii) the form and contents of notices required or permitted to be registered under section 49 in a land titles office and the manner of their use;

(g) prescribing the form of any notices required or allowed to be given under this Act and providing for their use;

(h) prescribing the maximum amounts of compensation payable under sections 46 and 47;

(i) respecting the manner in which a search may be made;

(j) requiring or permitting the use of a statement to confirm the registration of any financing statement or financing change statement and permitting the amendment of an error in registering on the part of the Registrar or the Registry and prescribing the limits of such amendments;

(k) prescribing the portion of the registration fees to be paid into the Fund;

(l) prescribing abbreviations, expansions or symbols that may be used in a financing statement, financing change statement or any other form authorized or required by this Act, or in the recording or production of information by the Registrar;

(m) governing the right of a secured party to indicate the length of time during which a financing statement or a financing change statement renewing the financing statement shall be effective;

(n) defining any word or expression used in this Act that is required to be defined in the regulations;

(o) authorizing the Registrar to enter into agreements whereby fees may be charged on account;

(p) governing agreements for charging fees under clause (o);

(q) prescribing the amount of any charge to which the secured party is entitled under section 17(8);

(r) governing the grounds on which the Registrar may refuse to register a financing statement;

(s) prescribing the manner in which collateral that has been assigned must be described;

(t) prescribing the type of goods to be serial numbered;

(u) prescribing circumstances and methods for perfecting a security interest in proceeds;

(v) prescribing any matter required or authorized by this Act to be prescribed by regulation.

Amends RSA 1980 cA-10

78 *The Agricultural Relief Advances Act is amended*

(a) in section 16 by striking out "Bills of Sale Act" and substituting "Personal Property Security Act";

(b) by repealing section 21(2) and substituting the following:

(2) The *Personal Property Security Act* applies to a mortgage referred to in subsection (1) except that no fee is payable on the registration of the mortgage.

Amends SA 1981 cB-15

79 *The Business Corporations Act is amended by repealing Division 2 of Part 7.*

Amends RSA 1980 cC-24

80 *The Co-operative Associations Act is amended by repealing section 14.*

Amends RSA 1980 cC-34

81 *The Crop Liens Priorities Act is amended by repealing section 1(b).*

Amends RSA 1980 cE-10.1

82 *The Employment Standards Act is amended in section 101*

(a) by repealing subsection (1)(b) and substituting the following:

(b) in the Personal Property Registry under the *Personal Property Security Act* together with a financing statement prescribed under that Act against the personal property of the employer in respect of whom the order is made;

(b) in subsection (4) by striking out "an order in a registry under the *Chattel Security Registries Act*" *and substituting* "a financing statement in the Personal Property Registry under the *Personal Property Security Act*";

(c) in subsection (5) by striking out "an itinerant machine as defined in the *Bills of Sale Act*" *and substituting* "serial numbered goods required to be registered by serial number";

(d) by repealing subsection (6).

Amends RSA 1980 cF-1

83 *The Factors Act is amended*

(a) by adding the following after section 5:

5.1 Sections 2 to 5 do not apply to a consignment to which the *Personal Property Security Act* applies.

(b) in section 8 by renumbering it as section 8(1) and by adding the following after subsection (1):

(2) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*, and Part 4 of that Act applies, with all necessary modifications, to such registration.

(c) by repealing section 9(2) and substituting the following:

(2) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods by a person who has obtained possession of the goods pursuant to a security agreement under which the seller has a security interest as defined in the *Personal Property Security Act.*

COMMENT:

1. Sections 2-5 of the Factors Act, R.S.A. 1980, c. F-1 give, under prescribed circumstances, to a mercantile agent the power to transfer to or create security interests in favour of third parties. The policy underlying the sections is that when an owner of goods places his goods or documents of title to his goods in the hands of a mercantile agent, he creates a situation in which the mercantile agent appears to be clothed with authority to sell or otherwise deal with the goods or documents of title. People dealing with mercantile agents in the ordinary course of business should not be required to determine the extent of his authority.

Bill 73 provides an alternative system for protection of persons who deal with certain types of consignees. See sections 1(1)(c) and 3. This system requires public notice of consignment arrangements so as to give third parties the facility to discover the extent of the consignee's authority to deal with goods in his possession. However, in most cases, the outcome of an abuse of authority will be the same whether the scheme of Bill 73 or that of the Factors Act applies. The buyer in the ordinary course of business from a mercantile agent will be protected in the Bill. See section 28(1).

It should be noted that the Factors Act system will not be totally displaced by that of the Bill. Bill 73 applies only to a limited range of consignments. See section 1(1)(c). For example, the Factors Act would continue to apply where the consignor is not in the business of consigning goods. Further, the Bill does not apply where a mercantile agent deals with documents of title to goods.

2. Section 8 of the Factors Act provides:

> 8. If a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer of those goods or documents of title by that person, or by a mercantile agent acting for him, under a sale, pledge or other disposition, or under an agreement for sale, pledge or other disposition, to a person receiving the goods or documents of title in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make that disposition.

The operation of the section is illustrated in the following scenario. A, who initially owns an item of goods, sells his interest in the item to B, but retains possession of it. Title and property pass to B. A fraudulently convinces C that he, A, is the owner of the item in his possession and induces C to enter into a contract to buy the item. At common law, C gets no title or property: nemo dat quod non habet. Section 8 reverses the common law rule and gives to A the power to transfer B's ownership to C in the circumstances prescribed by the section. Under existing law, B might try to protect his interest by registration of the bill of sale between himself and A under the Bills of Sale Act. However, since registration under that Act is not likely to be held by the Alberta courts as constructive notice of B's interest, it is doubtful that the operation of section 8 could be avoided in this way.

Section 8(2) which will be added to the Factors Act by section 83(b) of the Bill, provides a mechanism through which B can protect his interest. It contemplates a registry for interests arising under bills of sale. If B registers a financing statement in compliance with the regulations of the Personal Property Registry, the common law rule will apply, not section 8(1) of the Factors Act. C would not acquire title and property to the item. However, he would have available a mechanism through which he can discover in advance the existence of B's interest and can avoid being deceived by A.

It should be noted that section 8(1) of the Factors Act will continue to apply if the sale from A to C occurred in the ordinary course of the business of A. Buyers are not required to conduct a registry search when dealing with someone acting in the ordinary course of business.

Amends RSA 1980 cG-1

84*(1) The Garagemen's Lien Act is amended*

(a) by repealing section 1(d) and substituting the following:

(d) "prescribed" means prescribed in the regulations made under the *ersonal Property Security Act;*

(e) "registrar" means the Registrar of the registry;

(f) "registry" means the Personal Property Registry under the *Personal Property Security Act.*

(b) in section 3(1) by striking out all that portion following clause (c) and substituting the following:

as the case may be, unless on or before the 21st day the garageman files a financing statement in the prescribed form in the registry, which filing is effective from the time assigned to the financing statement by the registrar until the expiry of the financing statement under section 6 or until a financing change statement is filed in accordance with section 8(2) and 8.1.

(c) in section 3(2) by striking out "claim" *and substituting* "financing statement";

(d) by repealing section 4;

(e) by repealing section 5(b) and substituting the following:

(b) that was created or arose before the filing of the financing statement referred to in section 3(1).

(f) by repealing section 7 and substituting the following:

7(1) On the filing of a financing statement pursuant to this Act, the lien continues for a further period of 6 months from the date of filing.

(2) A lien determines on the expiry of 6 months from the date of filing of the financing statement unless, within the period of 6 months,

(a) there is issued and delivered to the sheriff a copy of the financing statement, financing change statement or a certified printed search result and a warrant in the prescribed form addressed to the sheriff of the judicial district in which the motor vehicle or farm vehicle that is subject to the lien is for the time being and directing the sheriff to seize the motor vehicle or farm vehicle in accordance with the requirements of the *Seizures Act,* and

(b) seizure of the motor vehicle or farm vehicle that is subject to the lien has been effected.

(3) Notwithstanding subsection (2), when it appears that a seizure cannot be effected within the 6 months provided for in that subsection, the Court of Queen's Bench may, on ex parte application made during those 6 months, extend the time within which the seizure may be made for a further period not exceeding 6 months from the date of the order, and in that case the lien does not determine until the date so specified, if a certified copy of the order and an accompanying financing change statement are filed with the registrar prior to the expiration of the 6-month period referred to in subsection (2).

(g) by renumbering section 8 as section 8(1) and adding the following after subsection (1):

(2) Where the garageman fails to discharge a financing statement pursuant to subsection (1), section 52(3) to (8) of the *Personal Property Security Act* apply, and any person has a right to recover loss or damage that he suffered and that was reasonably foreseeable as likely to result from the garageman's failure to discharge the financing statement.

Amends RSA 1980 cI-5

85 *The Insurance Act is amended in section 541(16)(b) by striking out "Chattel Security Registries Act" and substituting "Personal Property Security Act".*

Amends RSA 1980 cL-5

86 *The Land Titles Act is amended in section 107*

(a) by repealing subsection (1)(a) and substituting the following:

(a) contained in a purchase money security agreement that may be registered under the *Personal Property Security Act*, or

(b) by adding the following after subsection (3):

(4) In this section, "purchase money security agreement" means an agreement that contains a purchase money security interest as defined in the *Personal Property Security Act*.

Amends RSA 1980 cL-8

87 *The Law of Property Act is amended by repealing Part 6 and substituting the following:*

PART 6
ENFORCEMENT OF PURCHASE MONEY SECURITY AGREEMENTS

47 In this Part,

(a) "consumer goods" means consumer goods as defined in the *Personal Property Security Act*;

(b) "consumer services" means services acquired by an individual other than for the benefit of or use in a business, profession or calling and acquired from a person who is engaged in the business of providing those services;

(c) "debtor" means a debtor under a purchase money security agreement;

(d) "purchase money security interest" means

(i) a security interest taken or reserved in goods by a seller to secure payment of all or part of its purchase price, or

(ii) a sale made pursuant to a contract of bailment under which it is intended that the property in the goods will pass to the bailee on the payment of the purchase price in whole or in part or on the performance of a condition;

(e) "secured party" means a secured party under a purchase money security agreement;

(f) "security interest" means an interest in goods that secures payment or performance of an obligation.

48(1) The right of an assignee of a secured party under a purchase money security agreement made in respect of consumer goods or an assignment of rights under an agreement for the purchase of consumer services to have the whole or any part of the agreement performed by the debtor is no greater than that the secured party would have had in any action on the agreement and the assignee is subject to the same obligations, duties, liabilities and defences, other than counterclaim, as the seller would have been.

(2) Any portion of a purchase money security agreement that

(a) purports in any manner to limit or render inapplicable, or

(b) has the effect of in any manner limiting or rendering inapplicable

the application of subsection (1) is contrary to public policy and void.

49(1) A secured party may enforce his right to recover the purchase price owing to him under a purchase money security agreement either

(a) by seizure of the goods pursuant to the agreement, in the manner provided by the *Personal Property Security Act*, or

(b) by an action against the debtor for the money owing in respect of the goods.

(2) If the secured party elects to seize the goods and the goods are seized, his rights are restricted to his right of repossession and sale of the goods and no action is maintainable for the purchase price or any part of it, notwithstanding anything to the contrary in any Act or in any agreement between the secured party and the debtor.

(3) If the secured party elects to bring an action against the debtor and recovers a judgment for the money owing, then if the goods in respect of which that money is owing are seized under a writ of execution issued pursuant to that judgment,

(a) the secured party's rights are restricted to the amount realized from the sale of those goods, and

(b) the judgment, to the extent that it is based on the purchase price of those goods, and the taxed costs, shall be deemed to be fully paid and satisfied.

(4) When goods

(a) are surrendered by the buyer to the secured party with the secured party's consent, or

(b) are seized pursuant to the agreement or under execution and are

(i) sold in accordance with the *Seizures Act*,

(ii) disposed of in accordance with the *Personal Property Security Act*, or

(iii) ordered by a court to be delivered up to the secured party or execution creditor,

the indebtedness of the debtor under the agreement, or under a judgment for the money owing to the extent that it is based on the purchase price of the goods, is extinguished, and any money thereafter paid in respect of the purchase price, or judgment therefor, is recoverable by action against the secured party.

(5) Any waiver or release of any or all of the rights, benefits or protection given to debtors by this section is against public policy and void, except when the waiver or release is given by a corporation.

50(1) Section 49 does not apply if, after seizure, the goods are destroyed or damaged to such an extent that the interest of the secured party's security is materially impaired either by the wilful act of the debtor or by his neglect or otherwise.

(2) Notwithstanding anything in section 49, if a secured party, in order to recover unpaid purchase money due, has seized the goods, and it is found that an accessory forming part of his security was removed from the goods before they were seized and was not replaced by another accessory of a like kind and value, the secured party may sue the debtor

(a) for the value of the accessory, or

(b) for the amount by which the sum realized on the sale of the goods falls short of the amount owing by the debtor and the amount of the proper fees, charges, claims and disbursements in connection with the seizure and the sale,

whichever is less.

(3) Section 49 does not apply to a sale of

(a) machinery, equipment or material manufactured or made for use in the exploration for, or in the production of, petroleum or natural gas, or

(b) rolling stock or equipment for use on railways.

Amends RSA 1980 cL-20

88 *The Livery Stable Keepers Act is amended in section 2(2) by striking out* "chattel mortgage, bill of sale," *and substituting* "security interest as defined in the *Personal Property Security Act*".

Amends RSA 1980 cM-9

89 *The Matrimonial Property Act is amended*

(a) in section 23 by striking out "at the Vehicle Registry under the *Chattel Securities Registries Act*" *and substituting* "by filing a financing statement in the Personal Property Registry under the *Personal Property Security Act*".

(b) by repealing section 26 and substituting the following:

26 If the Court makes an order with respect to household goods under section 25, the order may be registered by filing a financing statement in the Personal Property Registry under the *Personal Property Security Act.*

(c) in section 27(1)(b) by adding "of the financing statement" *after* "registration".

Amends SA 1982 cM-18.5

90 *The Mobile Home Sites Tenancies Act is amended in section 1*

(a) by adding the following after subsection (1)(f):

(f.1) "purchase money security agreement" means an agreement that contains a purchase money security interest;

(f.2) "purchase money security interest" means

(i) a security interest taken or reserved by a seller in a mobile home to secure payment of all or part of its purchase price, or

(ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to a mobile home, to the extent that the value is applied to acquire those rights;

(b) by repealing subsection (2) and substituting the following:

(2) For the purposes of this Act, a debtor under a purchase money security agreement is deemed to own the mobile home.

(c) in section 29(2)(b) by striking out "Central Registry or Vehicle Registry constituted under the *Chattel Security Registries Act*" *and substituting* "Personal Property Registry under the *Personal Property Security Act*".

Amends RSA 1980 cM-22

91 *The Motor Vehicle Administration Act is amended in section 93(4) by striking out* "Central Registry under the *Chattel Security Registries Act*" *and substituting* "Personal Property Registry under the *Personal Property Security Act*".

Amends RSA 1980 cM-26

92 *The Municipal Government Act is amended*

a) in section 267(4) by striking out "Bills of Sale Act" and substituting "Personal Property Security Act";

(b) in section 272

(i) by repealing subsection (2) and substituting the following:

(2) The *Personal Property Security Act* applies to a mortgage mentioned in subsection (1) except that no fee is payable in the registration of the mortgage as a security interest under that Act.

(ii) in subsection (3) by striking out "or encumbrance" *wherever it occurs and substituting* ", encumbrance or security interest".

Amends RSA 1980 cP-2

93 *The Partnership Act is amended*

(a) in section 1

(i) by repealing clause (b);

(ii) by adding the following after clause (e):

(f) "Personal Property Registry" means the Personal Property Registry under the *Personal Property Security Act.*

(b) in section 51(3) and 70(2) by striking out "Chattel Security Registries Act" and substituting "Personal Property Security Act";

(c) in the following provisions by striking out "Central Registry" *wherever it occurs and substituting* "Personal Property Registry":

section 51(1) and (1.1);

section 71;

section 77(2);

section 81;

section 82(2);

section 85(1);

section 86; section 91. Amends RSA 1980 cS-2

94 *The Sale of Goods Act is amended*

(a) by renumbering section 26 as 26(1) and by adding the following after subsection (1):

(2) Notwithstanding the *Personal Property Security Act,* the interest of a buyer under subsection (1) takes priority over any security interest in the grain, if the interest of the buyer is acquired under the circumstances described in subsection (1).

(b) in section 27

(i) by adding the following after subsection (1):

(1.1) Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act,* and Part 4 of that Act applies, with the necessary modifications, to such registration.

(ii) by adding the following after subsection (2):

(2.1) Subsection (2) does not apply to a sale, pledge or other disposition of goods or documents of title to goods by a person who has obtained possession of the goods pursuant to a security agreement under which the seller has a security interest as defined in the *Personal Property Security Act.*

(iii) by repealing subsection (3).

COMMENT:

1. Section 26 of the Sale of Goods Act, R.S.A. 1980, c. S-2 provides:

When grain is sold and delivered at an elevator licensed under the Canada Grain Act (Canada) to the manager or operator thereof as defined in that Act or to a track buyer licensed under that Act, the buyer acquires a good title to the grain so bought and delivered if the buyer

(a) buys it in good faith and without actual knowledge of any defect or want of title on the part of the seller in the grain so sold and delivered, and

(b) keeps a record showing the kind of vehicle from which the grain is delivered into the elevator or car, as the case may be, and if that vehicle is a motor propelled vehicle or a trailer drawn by a motor propelled vehicle, the licence number of it.

It is clear that this provision is intended to remove impediments to the free and efficient transfer of grain where licensed elevators and track buyers who have bought in good faith are involved. Accordingly, a security interest which is taken and perfected in grain is subordinated to the interest of such buyers. Section 94(a) of the Bill, which amends section 26 of the Sale of Goods Act, is designed to perpetuate the policy of section 26 in the context of the system prescribed by the Bill.

2. For explanation of section 94(b)(i), which amends section 27 of the Sale of Goods Act, see commentary 2, section 83.

Amends SA 1981 cS-6.1

95 *The Securities Act is amended in section 66(f) by striking out* "conditional sales contract" *and substituting* "security agreement as defined in the *Personal Property Security Act*".

Amends RSA 1980 cS-11

96 *The Seizures Act is amended in section 8*

(a) in subsection (1) by adding "or security interest in" *after* "encumbrance on";

(b) in subsections (2), (3) and (4) by striking out "or encumbrance" *and substituting* ", encumbrance or security interest".

Amends RSA 1980 cT-4

97 *The Threshers' Lien Act is amended by repealing section 2(1)(b) and substituting the following:*

(b) over all security agreements as defined in the *Personal Property Security Act*, or conveyances, made by the owner of the grain, and

Amends RSA 1980 cT-9

98 *The Trust Companies Act is amended in sections 148(15)(b) and 151(1)(d) by striking out "Chattel Security Registries Act" and substituting "Personal Property Security Act".*

Amends RSA 1980 cW-3

99 *The Warehousemen's Lien Act is amended*

(a) in section 1 by adding the following after clause (a):

(a.1) "security interest" means an interest in goods that secures payment or performance of an obligation;

(b) by repealing section 5(1) and substituting the following:

5 (1) Where the goods on which a lien exists were deposited not by the owner nor by his authority but by a person entrusted by the owner or by his authority with the possession of the goods, the warehouseman shall, within 2 months after the date of the deposit, give notice of the lien to

(a) the owner of the goods, and

(b) any person who has a security interest in the goods where a financing statement is registered at the date of the deposit with respect to the security interest or where the security interest is perfected on that date according to the *Personal Property Security Act* without registration.

(c) by repealing section 6(2)(b) and (c) and substituting the following:

(b) to the owner of the goods and to any person who has a security interest in the goods where a financing statement is registered at the date of the deposit with respect to the security interest or where the security interest is perfected on that date according to the *Personal Property Security Act* without registration, and

Repeal

100 *The following are repealed:*

(a) Assignment of Book Debts Act;

(b) Bills of Sale Act;

(c) Chattel Security Registries Act;

(d) Conditional Sales Act;

(e) Harvesting Liens Act.

Coming into force

101 *This Act comes into force on Proclamation.*